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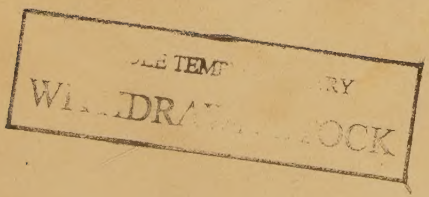

A MANUAL

OF THE

PRINCIPLES OF EQUITY.

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A MANUAL

OF THE

PRINCIPLES OF EQUITY.

A CONCISE AND EXPLANATORY TREATISE INTENDED FOR THE USE OF STUDENTS AND THE PROFESSION.

BY

JOHN INDERMAUR, SOLICITOR,

AUTHOR OF "PRINCIPLES OF THE COMMON LAW," "MANUAL OF PRACTICE," "EPITOMES OF LEADING CASES," ETC., ETC.

SIXTH EDITION

BY

CHARLES THWAITES, SOLICITOR.

First Prizeman, June, 1880; and Sheffield Prizeman, Conveyancing Gold Medallist, Scott Scholar, and Reardon Prizeman of that year.

AUTHOR OF "GUIDE TO CRIMINAL LAW AND PROCEDURE," ETC.; EDITOR OF "INDERMAUR AND THWAITES' CONVEYANCING," "INDERMAUR'S PRINCIPLES OF COMMON LAW," "INDERMAUR'S MANUAL OF PRACTICE," ETC., ETC.

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PREFACE TO SIXTH EDITION.

In preparing this edition I have found my intimate familiarity with the work since its first appearance in December, 1886, of considerable assistance.

The entire book has been carefully revised and considerable portions rewritten, much new matter has been added, and the cases and statutes of the past four years inserted as appeared advisable. Perhaps the greatest alterations in the text are in the chapters on Trusts, Trustees, and Administration. The references to cases are brought down to September, 1906, and have been carefully checked throughout. Over 300 cases are referred to which did not appear in the last edition. But with all the additions and alterations, the text is only increased by 30 pages ; and it cannot be considered excessive for what is intended to be a complete and reliable text book on Equity for students.

Throughout I have aimed at accuracy of expression, simplicity of language, and sufficient fulness of statement to preclude obscurity of meaning. How far I have succeeded in realizing these high ideals must remain for others to judge.

The work is still primarily intended for the use of students, and for that reason illustrations are largely given, the names of cases are freely quoted in the marginal notes, and the Trustee Acts and Partnership Act are printed *in extenso* at the end. But in the

work of revision, it has been borne in mind that the book is to a limited extent intended to be useful to the practitioner.

A good Index is an essential feature of a law book, and I think mine will be found thorough and complete.

I gratefully acknowledge the assistance I have derived from discussing various points with my friend and former colleague, Mr. John Indermaur, who was the author of the work. I am also indebted to various pupils for remarks and suggestions made while taking them through the work.

C. THWAITES.

22, CHANCERY LANE, LONDON,
October, 1906.

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Carson's Real Property Statutes	—	1902
Coote on Mortgages	7th	1904
Dart on Vendors and Purchasers	7th	1905
Elmer's Lunacy Practice	7th	1892
Fisher on Mortgages	5th	1897
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Goodeve's Personal Property	4th	1904
Hood and Challis' Conveyancing and Settled Land Acts	6th	1906
Indermaur and Thwaites' Conveyancing	2nd	1904
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Smith's (H. A.) Principles of Equity	3rd	1902
Snell's Principles of Equity	14th	1905
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Story's Commentaries on Equity Jurisprudence (English Edition by W. E. Grigsby)	2nd	1892
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Underhill's Law of Trusts and Trustees	6th	1904
Wharton's Law Lexicon	10th	1902
White and Tudor's Leading Cases in Equity	7th	1897
Williams on Executors	10th	1905
Williams' Principles of the Law of Personal Property	15th	1900
Williams' Principles of the Law of Real Property	20th	1906

A MANUAL

OF THE

PRINCIPLES OF EQUITY.

PART I.

THE ORIGIN AND SCOPE OF THE OLD COURT OF CHANCERY, ITS GROWTH, AND ITS MODERN SUBSTITUTE.

CHAPTER I.

THE COURT OF CHANCERY AS IT WAS.

The origin of Chancery.

THE origin of the Court of Chancery is, like many other ancient matters, involved in obscurity, but that it was a Court of very high antiquity cannot be doubted. The administration of justice in England was originally vested in the Aula Regis, or great Council of the King, and from it sprang the modern Courts of King's Bench, Common Pleas, and Exchequer. In these Courts there were certain forms of writ issued, and it was necessary that everything in respect of which relief was sought should come within one of these particular forms of writ. For certain matters, however, no appropriate writ was found, for there were of necessity a variety of particular cases happening which the forms allowed could not meet. It appears, therefore, that suitors who could not at law find their remedy, applied by bills, or petitions, to the Sovereign, who gave relief as

he thought fit; and, as these matters were commonly considered in Council, a weight of business accumulated. Accordingly, in the eighth year of Edward I.'s reign, an Ordinance was passed by which petitions of this sort were to be referred, according to their nature, to the Chancellor and the Justices, and in matters of grace to the Chancellor. The practice of appeal to the Sovereign to give relief in matters of this kind soon resolved itself into an application to the Chancellor direct, and it seems that his jurisdiction, or rather the jurisdiction of the Court of Chancery, was clearly established in the reign of Richard II., if not before.

The name of the Court.

The name of the Court, Chancery (*Cancellaria*), is clearly derived from that of the presiding officer, Chancellor (*Cancellarius*), a name supposed to have arisen from his cancelling (*a cancellando*) the King's Letters Patent when granted contrary to law, which is the highest point of jurisdiction.[1]

Two distinct kinds of Courts.

Taking it, then, that the Court of Chancery thus had its birth, there were in existence two distinct kinds of Courts, viz.: (1) The Courts of Common Law, and (2) The Court of Chancery. This latter has been styled a Court of Conscience, and perhaps in some way it merited the name. The object of its existence certainly seems to have been to supply the defects of the Common Law in giving relief where the Common Law could not give relief, or full and perfect, complete and speedy relief. Thus Selden wrote, rebuking Equity—"For Law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor; and, as that is larger or narrower so is Equity. 'Tis all one as if they should

Object of existence of Court of Chancery.

Selden's remarks on Equity.

[1] Story, English Edition, Chap. 2.

make the standard for to measure the Chancellor's foot. What an uncertain measure would this be. One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience." It is of no consequence to us now whether this was, or was not, a true account of Equity in bygone days, for it certainly is not Equity as it is to-day, or as it has been for very many years, though no doubt there was much in the early history of the Court of Chancery to justify such ideas. Still, the very origin of Equity was a righteous one, for it was to give relief where none could be obtained at Common Law, and its evils and general looseness arose probably from the fact that the administrators of Equity hardly knew what in fact were their functions in this respect. The Chancellors in those early days were almost universally either ecclesiastics or statesmen, exercising an authority delegated from the Crown as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not well defined, and their decrees were practically incapable of being resisted.[1]

Reason of original defects of Equity.

This being so, how could anything very good have been expected? Had matters thus continued, the Court of Chancery could never have become the power that it did become, and Equity, as distinguished from Law, would soon have been lost to sight, without being even to memory dear. Gradually, however, the Court of Chancery became settled as a Court of conscience indeed, but governed by fixed principles. In Lord Ellesmere's time the great power of this Court was shown, for then[2] arose a controversy of considerable heat and violence,

Growth of Equity.

Dispute between Lord Coke and Lord Ellesmere.

[1] Story, Chap. I.
[2] James I.'s reign.

upon the point whether the Court of Chancery could give relief against a judgment obtained at Common Law. Hallam tells us[1] that the cases reckoned cognizable in Chancery grew silently more and more numerous, and Sir Edward Coke, when he found the Court of Chancery prohibiting a person taking advantage of or enforcing execution upon a Common Law judgment which had been obtained by fraud, denied and opposed such a power to the extreme. There is no occasion here to go into the details of the war that was waged between Lord Coke and Lord Ellesmere. It will suffice to say that the matter being referred to the King in person, he decided in Lord Ellesmere's favour. The jurisdiction of Chancery in such a matter was never afterwards disputed.

The evil repute of Chancery.

Yet, though the power of Chancery was thus shown to be great, it was an unsatisfactory tribunal; firstly, because of its uncertainties, and, secondly, because of its delays. To show some of the popular ideas about this Court, notwithstanding the beauty of its origin, we need but refer to Cromwell's time, when that assuming body known as Barebone's Parliament, or the Little Parliament, excitedly voted the abolition of the Court of Chancery, a measure, Hallam tells us, "provoked by its insufferable delay, its engrossing of almost all suits, and the uncertainty of its decisions."[2] But the Court was not destined thus to sink out of existence, for with the Earl of Nottingham, who was elevated to the Bench in 1673, a new era was commenced. He has been styled the "father of Equity," for though Lord Bacon had previously given something of a systematic character to the business of the Court, yet the Earl of Nottingham was the real founder of Equity as a system of jurisprudence, instead of its being a Court in which

Real foundation of Equity jurisprudence.

[1] Hallam's History of England, Vol. I., 346.
[2] *Ibid.*, Vol. II., 243.

relief was given in most erratic fashion. The Earl of Nottingham presided as Chancellor for nine years, and he, as it were, built up a structure, which was afterwards extended, and in generalities almost completed, by Lord Hardwicke during his long period of twenty years' office.[1] The structure thus formed was perfected by his successors (notably Thurlow and Eldon), and the proud edifice of modern Equity, therefore, has but little resemblance to the ancient hut which bore the same name.

Importance of the Maxims of Equity.

These judges have indeed left behind them real traces of their handiwork, a matter which is dealt with in our next chapter on "The Maxims of Equity," maxims which have been laid down from time to time, and form the very foundation of the system. The student cannot pay too much attention to them, for he will find, practically, every important doctrine of the Court depending upon or proceeding from them. A thorough understanding of them is absolutely necessary. But, though forming, as it were, the structure, they are not everything, for various statutes dealing with the jurisdiction of Equity have from time to time been passed. Equity, therefore, has long been a fixed system; a Court in which relief is given on principles as well established as at Common Law; not acting in opposition to the Common Law, but, rather following it as far as possible, yet somewhat tempering its harshness, and giving relief in matters unrecognised by the Common Law, or in which the Common Law powers were defective. The two systems have generally harmonized well. Modern times have, however, brought about a fusion, and the beneficent influence of the doctrines of Equity may be felt throughout the whole of the Supreme Court of Judicature.

Equity a fixed system.

[1] Story, 34, 35.

What is Equity?

What, then, is Equity as distinguished from Law? It is certainly not natural justice. To attempt to deal out that kind of justice is too much for our frail humanity. There must always be left a large class of cases to be dealt with in the forum of conscience, and yet Equity had for its object to prevent persons doing anything which would soil their consciences.

Definition of Equity jurisprudence.

Equity may shortly be defined as a portion of justice not originally recognised at Common Law, yet not existing in opposition to it, but rather following it so far as consistent with justice, and administered where the Courts of Common Law could not give all necessary and satisfactory relief. We see thus the Court of Chancery as it was prior to the passing of the Judicature Act 1873, that is with regard to its powers and general scope.

As to divisions of Equity.

It has been customary for writers on Equity to divide the jurisdiction of the Court in some way, the most usual division being into three heads, viz.:—(1) The exclusive jurisdiction of the Court; (2) The concurrent jurisdiction of the Court; and (3) The auxiliary jurisdiction of the Court. The first head comprised those matters left entirely untouched by Common Law, *e.g.*, Trusts; the second those in which Common Law only gave some insufficient relief, or in which, though it originally gave no relief, it afterwards acquired such a power by statute, *e.g.*, Fraud, or the granting of Injunctions or Specific Performance; and the third where the Court gave a helping hand to Common Law and assisted it in exercising a jurisdiction which it possessed, *e.g.*, by granting Discovery. Such a division, since the fusion of Law and Equity, is clearly useless, and need only be referred to now as matter of history. These pages aim at giving a practical division in accordance with matters as they stand at the present time.

CHAPTER II.

THE GENERAL MAXIMS OF EQUITY.

In the last chapter we made incidental reference to the Maxims of Equity, and we now proceed to deal with the chief of these in detail.

1.—*Equity will not suffer a right to be without a remedy.*—This is a rule or maxim forming, as it were, the very foundation of Equity jurisprudence, for the idea of the origin of the Court was the fact of conscientious rights being in existence for which there was no relief to be had at Common Law. The maxim is sometimes expressed:—"There shall be no wrong without a remedy." The same thing is meant; there shall be no wrong without a remedy for its redress; there shall be no right without a remedy to enforce it. To this maxim we owe our modern doctrine of trusts,[1] and in fact, it is the key-note to all cases coming within the old head of the exclusive jurisdiction of the Court. It must, however, be remembered, that there are many matters, of a moral nature only, not within the cognizance of a Court of Equity, so this maxim must not be construed in its literal sense, but must be regarded as referring only to rights and wrongs which come within a class of rights or wrongs generally dealt with at Law, although as to the particular right or wrong there was no remedy.[2] When it was laid down by Lord Chancellor Ellesmere, under James I., that Chancery would

1. No right without a remedy.

Limitation of this maxim.

[1] See *post*, pp. 31, 32.
[2] Smith's Manual of Equity, 12, 13.

follow precedents, Equity tended to become a fixed system; and the principles giving rise to and regulating equitable rights gradually became settled, until to-day those principles are as unchangeable as those of the Common Law. Still, the application of these fixed principles to a new set of circumstances may give rise to the declaration of an equitable right not previously recognised.[1]

2. Equity follows the Law.

2.—*Equity follows the Law.*—By this is meant that Equity is not a body of jurisprudence acting in antagonism to Law, but rather the contrary. Equity gave relief in various cases where the Common Law could not, or a different relief to what the Common Law could give, but in so doing it never professed to act in antagonism to Law. Lord Chancellor Bacon laid down that it was the business of Equity "to supplement, but not to subvert, the Law." Thus Equity observed the same canons of descent, and generally respected the rules of Law; but where estates and interests coming under its cognisance were of such a nature that they were not recognized at Law, there was then no occasion for Equity to slavishly follow and apply legal rules if it was considered that greater justice could be done by inventing and laying down rules of its own. To thoroughly understand the maxim, therefore, it is necessary to distinguish between legal and equitable estates and interests. With regard to *legal* estates and interests coming under the cognizance of the Court of Chancery, that Court has always put the same construction upon them as the Courts of Law would have done. Thus, a grant to A and his heirs has always been held to confer a fee simple estate in Equity just as much as at Law. So also statutes have always received the same construction in

[1] Strahan and Kenrick, 12.

Equity as at Law, and, however morally unjust it may in particular cases seem, a legal right has always been held to be barred by force of the Statutes of Limitation just as much in Chancery as at Common Law. Yet to construe this maxim, "Equity follows the Law," literally would be an absurdity, for it would be as much as to say that Equity is in all respects the same as Law. The difference is that when *equitable* estates, rights, and interests are involved, Equity does not hesitate, if right and justice so demand, to depart from the strict legal construction, and adopts a construction more in accordance with the true intentions of the parties. The real meaning of the maxim is excellently illustrated by the doctrine of the Court as to the manner of construing executed and executory trusts—a matter which is hereafter dealt with.[1] The true meaning of this maxim would seem to be: that Equity is governed by legislative enactments and the rules of law in regard to legal estates, rights, and interests; and that it is regulated by the analogy of such legal estates, rights, and interests, and the legislative enactments and rules of law affecting the same, in regard to equitable estates, rights, and interests, *provided* (1) any such analogy plainly subsists, and (2) in each case there are no peculiar circumstances rendering it absolutely necessary to deviate from the maxim, or creating an equitable obligation on one of the litigant parties, and an equitable co-relative right in favour of another litigant party, and requiring a different course to be taken in the particular case, without overturning or destroying the general application of any legislative enactments or rules of law that may in terms, or by analogy, apply to the case.[2] The student will notice that Equity did not follow the law when it allowed

True meaning of this maxim.

[1] See *post*, pp. 48, 49; and *Lord Glenorchy* v. *Bosville*, 2 Wh. & Tu., 763.

[2] Smith's Manual, 14, 15.

a married woman to hold property separately from her husband, nor when it permitted restraint on anticipation; nor when it refused to apply incidents of tenure[1] to equitable estates in freeholds; nor when it allowed successive interests in chattels.

3. Equity regards the spirit and not the letter.

3.—*Equity regards the spirit and not the letter.*—This signifies that Equity looks more to the real intent of the parties than to the actual form of the transaction in question. Thus the form of a mortgage is that of an absolute conveyance with a right of redemption on a certain given day, and the construction at law was according to the words used, so that it was necessary that the day named should be strictly observed, otherwise the mortgagor lost his estate. But Equity has always regarded the transaction as being one simply for the securing of money, and has always allowed to the mortgagor his right or equity of redemption, although the day named has gone by.[2] So, also, the Court of Chancery in very early times gave relief on this same principle against penalties and forfeitures.[3]

4. Where the Equities are equal the Law prevails.

4.—*Where the Equities are equal the Law prevails.*

5. *Qui prior est tempore potior est jure.*

5.—*Qui prior est tempore potior est jure.*

Comparison of these two maxims.

These two maxims are placed together because, unless the one is considered in connection with the other, they would appear to clash. Equity does not pay any great respect to the mere circumstance of time, and the fifth maxim must be taken as entirely

[1] *E.g.*, Escheat, conveyance by feoffment, failure of a contingent remainder by not being ready to vest when the particular estate failed.

[2] See hereon, *post*, p. 185.

[3] See hereon, *post*, Part III., Chap. 5; and *Peachey* v. *Duke of Somerset*, 2 Wh. & Tu., 250; *Sloman* v. *Walters*, *Ibid.*, 257.

subservient to the fourth, which may be shortly explained thus: When on either side the equitable, or conscientious, rights are equal, then the Court will give the preference to that person who is possessed of the legal estate or title, for he is the person entitled by the rules of law, and as against him the Court will not interfere, for there is no reason why it should; the scale is evenly balanced on the Equities, and the Court therefore lets the Law weigh the scale down. Thus, suppose that a trustee possessed of the legal estate in property successfully conceals the trust, and represents himself as the legal and beneficial owner of the property, and on that footing sells and conveys to a *bonâ fide* purchaser for value, who has no notice whatever of the trust, this purchaser has surely an equal equity with the defrauded *cestui que trust*, and, by reason of possession of the legal estate, prevails over him.[1] And if this purchaser then sells and conveys to another who takes with notice of the original trust, but is not the fraudulent trustee, such second purchaser enjoys the same freedom from the rights of the defrauded *cestui que trust* as did the first purchaser. Again, suppose that A is a trustee of distinct funds for two distinct beneficiaries, B and C. B institutes proceedings against A for administration of his trust by the Court, and in this action A is ordered to pay £1,000, representing the trust money, into Court. A then wrongfully takes this sum from C's trust money, and complies with the order, and thus B gets his money. Afterwards, C discovers what has been done, but he cannot follow the money and get it back from B, for C's right to follow it is no greater than B's right to retain it, and B's legal title therefore prevails.[2] In

Purchaser without notice

Thorndike v. *Hunt*.

[1] See *Pilcher* v. *Rawlins* (1872), 41 L. J., Ch., 485.

[2] *Thorndike* v. *Hunt*, 3 De G. & J., 563; *Taylor* v. *Blacklock*, 32 Ch. D., 560; 55 L. T., 8. See also *Taylor* v. *Russell* (1892), A. C., 244; 61 L. J., Ch., 657; 66 L. T., 565.

all cases, however, in which reliance is placed on a legal title, it must be carefully borne in mind that the equities or conscientious rights must be equal, so that notice, actual or constructive, of another's rights would of course defeat the advantage that would otherwise be gained.[1] Thus, X contracts to buy freeholds from Y, and on investigating the title, discovers that the land was once subject to an equitable charge. Y declares this charge has been paid off, and produces a forged receipt for the money. X completes his purchase, but he is bound by the equitable charge.[2]

Jared v. *Clements.*

Tacking.

Another illustration of the fourth maxim is furnished by the doctrine affecting mortgages known as Tacking.[3] Under this doctrine, if a first mortgagee, not knowing of a second mortgage created by his mortgagor, makes further advances on the same security, he will have priority over the intervening incumbrancer for these further advances as well as for the amount of his first advance. And so, where a person makes an advance on what he believes to be a second mortgage, but in fact it is a third mortgage, if he can buy up the first mortgage and get a transfer of the legal estate to himself, he will then have entire priority over the intervening incumbrancer. Now, in each of these instances, the respect shown to the possession of the legal estate, or legal title, is plainly visible, and it is also equally plain that this maxim altogether overrides the mere point of priority of time. Certainly, the second mortgagee is prior to the third, but the third mortgagee, having advanced his money without notice of the second

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[1] As to notice, see *post*, pp. 214-216.

[2] *Jared* v. *Clements* (1903), 1 Ch., 428; 72 L. J., Ch., 291; 88 L. T., 97.

[3] As to which, see *post*, pp. 216-219; and *Marsh* v. *Lee*, 2 Wh. & Tu., 107

mortgage, is allowed to clothe himself with the legal estate by getting in the first mortgage, and then he ousts the second mortgagee, although he may, when he does this, know of his existence.

When the question of time is of importance.

But yet the maxim, *Qui prior est tempore potior est jure*, is of importance, applying as it does to cases not involving the ownership of the legal estate or title. Where there are several persons having equal equities—that is, equal moral or conscientious rights—and none of them has possession of the legal title or estate, then the question of time governs. Thus, take the case of several equitable charges given on the same property, here, in the absence of any special circumstances, they rank in order of date. A good illustration of the application of this maxim is found in *Re Richards*, *Humber* v. *Richards*.[1] There R, a solicitor, in 1883, received money from a client for investment, and represented to him that he had invested it upon a certain mortgage. The mortgage, however, was one which R had previously taken in his own name, and it was never transferred to the client. R afterwards deposited the title deeds of the mortgaged property with his bank to secure his overdrawn account, and paid interest to the client down to the date of the death of the latter in 1885, and subsequently to his executors. R died in 1888, his banking account being overdrawn to an extent exceeding the value of the mortgaged property, and the bank immediately gave notice of their claim to the mortgagors. The bank had no notice of the client's claim at the date of the deposit, and their notice to the mortgagor was prior to any notice given by the client's executors. It was held that R was a trustee of the mortgage for

Re Richards, *Humber* v. *Richards*.

[1] 45 Ch. D., 589; 59 L. J., Ch., 728; 63 L. T., 450. See also *Moore* v. *North Western Bank* (1891), 2 Ch., 599; 60 L. J., Ch., 627; 64 L. T., 456.

his client, and that neither the client, nor his executors, had been guilty of any negligence so as to deprive them of their priority.

Special circumstances defeating priority.

But although neither party may have a legal estate or title, and therefore primarily the maxim, *Qui prior est tempore potior est jure* will apply, yet if there are any special circumstances it may be otherwise, for there may be fraud, or at any rate negligence, which may prevent the equities, or moral rights, being considered equal. Thus, in *Farrand* v. *Yorkshire Banking Co.*[1] the facts were as follows:—Turner advanced £200 to Prince to enable him to complete the purchase of some copyholds, on security of a signed agreement that Prince would, as soon as he was admitted to the copyholds, surrender them to Turner as mortgagee, and that Prince would hand the title deeds to Turner's solicitor to prepare the mortgage as soon as he obtained them. Prince completed the purchase, but then, instead of carrying out his agreement with Turner, deposited the title deeds with the Yorkshire Banking Company—who had no notice of Turner's rights—to secure certain moneys, and he gave the bank an equitable mortgage. Many years elapsed before the Banking Company received notice of Turner's claim, and it was held that the bank were entitled to priority, for that Turner had been guilty of such negligence in making no enquiry about the title deeds as to deprive him of the priority he would otherwise have had.

Farrand v. *Yorkshire Banking Co.*

Assignment of choses in action.

To entitle a person to claim precedence by force of the maxim, *Qui prior est tempore potior est jure*, it is necessary that he should have done everything

[1] 40 Ch. D., 182; 58 L. J., Ch., 238; 60 L. T., 669. See also *Rice* v. *Rice* (1854), 23 L. J., Ch., 289; *Re Castell & Brown, Limited* (1898), 1 Ch., 315; 67 L. J., Ch., 169; 78 L. T., 109; *Rimmer* v. *Webster* (1902), 2 Ch., 163; 71 L. J., Ch., 561; 86 L. T., 491.

he can to complete his position, otherwise he may find that he has not got so good an equity as some other claimant. This is well shown by reference to the assignment of choses in action. Firstly, we must notice with regard to them that an absolute assignment, not by way of charge only, will entitle the assignee to sue in his own name, provided the assignment is in signed writing, and notice in writing is given to the holder of the chose.[1] Secondly, it is necessary to observe that, irrespective of this, there may be many good assignments in Equity—what are called equitable assignments—and to constitute such, all that is required is a definite intention to assign, and a valuable consideration, *e.g.*, an order given by a debtor to his creditor upon a person having moneys of the debtor in his hands, directing such person thereout to pay the creditor[2]; and such equitable assignments are valid against the assignor, and his personal representatives, and the trustee in his subsequent bankruptcy, and a subsequent garnishee order. But a mere mandate, given by a debtor to his agent to pay a specified creditor and not communicated to the latter, is not an equitable assignment, and can be revoked by countermand of payment or the death or bankruptcy of the debtor.[3] And if A owes money to B, and B is indebted to C, and B writes to X to receive the money from A and pay it to C, and X writes to C promising to pay him the money when received, this is not an equitable assignment.[4] Nor is a mere order to pay, which does not specify the fund or debt out of which payment is to be made.[5] What is, however, particularly

Judicature Act 1873, sec. 25.

Equitable assignments

[1] 36 & 37 Vict., c. 66 (Judicature Act 1873), sec. 25.

[2] *Diplock* v. *Hammond*, 2 De G. M. & G., 320; *Brice* v. *Bannister*, 3 Q. B. D., 569; 47 L. J., Q. B., 722. See particularly Lord Macnaghten's judgment in *Brandt v. Dunlop Rubber Co.* (1905), A. C., 454; 74 L. J., K. B., 898; 93 L. T., 495.

[3] *Morell* v. *Wooten*, 16 B., 197; *Re Russell*, 37 Sol. Jl., 212.

[4] *Rodick* v. *Gandell*, 1 De G. M. & G., 763.

[5] *Percival* v. *Dunn*, 29 Ch. D., 128; 54 L. J., Ch., 572; 52 L. T., 320; *Palmer* v. *Culverwell*, 85 L. T., 758.

necessary to observe in connection with the maxim under consideration is, that with regard to any assignment of a chose in action, and quite irrespective of the further advantage to be gained of the assignee suing in his own name if the assignment comes within the provisions of the Judicature Act 1873 above referred to, it is most important that the assignee should at once give notice to the person in whose hands the outstanding debt or other property constituting the chose in action is. Thus, if A assigns to B a debt owing to him by C, B must at once give C notice of the assignment, otherwise C not knowing of it may pay the debt to A. Or A may subsequently assign the debt to D, who does not know of the prior assignment to B, and at once proceeds to give C notice of his assignment, and thus gains priority over B. Equally would this be so, if A was entitled to a share of a fund in the hands of trustees, and assigned the same to B; it is most important that B should at once give notice to the trustees, to perfect his title and complete his rights to the property. If no notice is given, the assignee is in a sense guilty of laches, for though certainly by the assignment his rights are usually complete as against the assignor,[1] he places it in the power of the assignor to deceive other persons who do not know, and have no means of knowing, of the previous dealing with the outstanding property. This doctrine of equity as to the necessity of notice in such cases was established by, and is sometimes styled, the rule in *Dearle* v. *Hall*.[2] When the assignee has given notice, he has done all he can to complete his assignment, and has acquired a perfect equity and binds the debt, or whatever the chose in action may consist

Dearle v. *Hall*

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[1] *Re Patrick, Bills* v. *Tatham* (1891), *post*, p. 39.

[2] 3 Russ., 1. See Snell's Equity, 65-70; 1 Wh. & Tu. 116 *et seq.* See also as to notice to trustees, *post*, pp. 112, 113.

of[1]; and this necessity of giving notice to perfect his position applies not only to a particular assignee, but even to a trustee in bankruptcy to whom the property of the debtor passes, so that if he fails to give notice, a subsequent assignee without notice may gain priority by first giving notice.[2] It has, however, been held that the doctrine of obtaining priority by notice does not apply to the shares of companies registered under the Companies Act 1862, or of any other company whose regulations forbid the entry of any trust on its register.[3] Nor does it apply to equitable estates or interests in freehold or leasehold land,[4] so that a second equitable sub-mortgagee of a mortgage of land will gain no priority by being the first to give notice to the original mortgagor.[5] The assignee of a fund in Court perfects his security by obtaining a stop order and lodging it at the paymaster's office.

Hopkins v. *Hemsworth.*

The case *of Bassett* v. *Nosworthy*[6] used to be sometimes quoted as illustrative of the maxim—*Where the Equities are equal the Law shall prevail*. It actually decided that a Court of Equity would not give discovery, in aid of a Common Law action of ejectment, in the exercise of its (now obsolete) auxiliary jurisdiction, to the heir against a purchaser from a devisee under a will alleged to be revoked, who pleaded that he had bought *bonâ fide* and without notice of any revocation. But now that Law and Equity are fused, and discovery is not peculiar to

Bassett v. *Nosworthy.*

[1] To this there is one exception, viz. : that notice to a debtor who has given a negotiable instrument for his debt, that the debt has been assigned by the creditor, can be disregarded by the debtor, *Bence* v. *Shearman* (1898), 2 Ch., 582 ; 67 L. J., Ch., 513 ; 78 L. T., 804.

[2] *Re Stone's Will*, W. N. (1893), 59; 9 T. L. R., 346.

[3] *Société Generale* v. *Walker* (1885), 11 App. Ca., 20 ; 55 L. J., Q. B., 169 ; 59 L. T., 389.

[4] *Wiltshire* v. *Rabbits*, 14 Si. 78.

[5] *Hopkins v. Hemsworth* (1898), 2 Ch., 347 ; 67 L. J., Ch., 526 ; 78 L. T., 832.

[6] 2 Wh. & Tu., 150.

Ind v. *Emmerson.*

one Division of the High Court, the principle of this decision is not fully applicable. Thus, a devisee under a will brought an action of ejectment against a purchaser from the testator's heir-at-law. The testator was a fee simple owner, and was supposed to have died intestate, and the defendant bought of his heir, and was in possession under that title. The plaintiff now alleged that a will had, subsequently to the sale, been discovered under which he took the lands. The defendant pleaded (1) that he was in possession, and (2) that he was a *bonâ fide* purchaser for value; and on this latter ground he resisted an order for discovery. It was held by the House of Lords that the defendant could not successfully resist discovery, for the action was not like a Bill of Discovery in aid of an action at Common Law, but was really an action of ejectment, and that the discovery being only sought as an incident in an action in which the Court had, since the Judicature Act 1873, full jurisdiction, the plaintiff was entitled to it.[1]

6. Equity looks on that as done which ought to be done.

6.—*Equity looks upon that as done which ought to be done.*—This maxim must not, of course, be taken in the wide and literal sense that Equity acts as a pure Court of conscience, and makes a person do that which is right. It only means that where a person has incurred an obligation to do something, then the Court looks on it as done, and as producing the same substantial results as if it were actually done. Thus, if land is contracted to be sold, the person contracting is deemed to be in the same position as if he had actually completed the contract by conveying the property, so that were he to die the purchase-money is the thing to be considered, and

[1] *Ind* v. *Emmerson*, 12 App. Ca., 300; 56 L. J., Ch., 989; 56 L. T., 778.

that goes to his next-of-kin. Again, if a testator by his will directs certain freehold property to be sold, and the proceeds paid to X, who survives the testator, but dies before the property is sold, yet the property, or the proceeds, will go to X's personal representatives. This introduces us to the doctrine of Conversion, a subject which is dealt with hereafter.[1]

7. Equity imputes an intention to fulfil an obligation.

7.—*Equity imputes an intention to fulfil an obligation.*—Equity is a Court established to do right, and it seems, therefore, only natural that it should impute to persons an intention to do what is right. A person is under an obligation to do some act, and he does one which though not exactly of the kind agreed to be done, yet bears much resemblance to it, or which is of such a kind that it may fairly be taken to have been his design to satisfy his obligation by what he has done. Thus, A agrees to buy and settle land; he buys some land and dies without settling it. This will generally be deemed to be an act done by him in performance or part performance of his covenant, and such a presumption is but putting a favourable construction on the acts of others, and taking it that a man will first apply himself to doing what he is bound to do. This is known as the doctrine of Performance, and closely allied to it is also the doctrine of Satisfaction, both of which matters are specially dealt with hereafter.[2]

8. He who seeks Equity must do Equity.

8.—*He who seeks Equity must do Equity.*—It seems but a natural principle that if a person comes to the Court to obtain what is equitable and fair the Court should require him to act equitably and fairly himself.

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[1] *Post*, Part III., Chap. 3; and see *Fletcher* v. *Ashburner*, 1 Wh. & Tu., 327.

[2] *Post*, Part III., Chap. 2; and see *Lechmere* v. *Lechmere*, 2 Wh. & Tu., 399; *Blandy* v. *Widmore*, *Ibid*, 407; *Ex parte Pye*, *Ibid*, 366.

This is all that the maxim means.[1] It must be remembered that if a person had legal rights he never had to seek the assistance of Equity, and that what he could get at Law he was usually allowed to get, but when he could not succeed there, and had to seek the aid of Equity to obtain what he desired, then surely there was nothing unreasonable in the Court saying to him, "We will give you what you ask, but you must yourself do what is right." Thus, take the case of a bargain with an expectant heir.[2] An expectant heir has borrowed £1,000 on terms that he will pay £2,000 on his father's death. He now comes to the Court to set the transaction aside, and the Court will set it aside, but only on the terms of his repaying the £1,000 with fair interest.[3] The doctrine of a wife's Equity to a settlement, in the limited form in which it originally existed, provides us with another illustration of the meaning of this maxim, for when a husband was obliged to come to the Court of Chancery to get possession of his wife's property, the Court would usually only render him assistance on condition that he made a fair settlement out of it on his wife.[4] The doctrines of Election and of Consolidation of mortgages afford other illustrations of this maxim.

9. He who comes into Equity must come with clean hands.

9.—*He who comes into Equity must come with clean hands.*—This means that the party coming to the Court for its assistance must not himself have been guilty of wrong conduct with regard to the transaction in question, so that if a person seeks to cancel or set aside some fraudulent deed, and he himself has been

[1] See *Rowley* v. *Ginnever* (1897), 2 Ch., 503; 66 L. J., Ch., 669; 77 L. T., 302.

[2] As to which, see *post*, Part II., Chap. 6, pp. 265-269.

[3] See *Earl of Aylesford* v. *Morris*, 8 Ch. Apps., 484; Brett's Eq. Cas., 70; *post*, p. 268.

[4] See *post*, Part III., Chap. 6, and *Lady Elibank* v. *Montolieu*, 1 Wh. & Tu., 621.

guilty of wilful participation in the fraud, the Court will not generally assist him, unless the fraud is against public policy and public policy would be defeated by allowing it to stand.[1] Thus, where an infant fraudulently misrepresented his age, and got payment of certain moneys from his trustees, it was held that although being an infant at the time of payment, his receipt was not valid and effectual, yet the Court would not render him assistance in his endeavour to make the trustees pay him the amount again.[2] *Overton* v. *Banister.*

10.—*Equality is Equity*, or, in other words, Equity favours a true equality between parties rather than a merely technical one. This is best explained by reference to the leaning of the Court against a joint tenancy, and in favour of a tenancy in common. True, if an estate is simply granted to two or more without other words, they become joint tenants both at Law and in Equity, for there is no reason why Equity should not here follow the Law.[3] But if there are any circumstances which justify the Court in doing so, the Court will depart from the legal rule, and hold them to be tenants in common, considering that to be a truer equality than the equal chance of taking by survivorship. The Court acts thus when property is purchased for some joint undertaking, *e.g.*, as a speculation for building purposes; also in all cases where the purchase-money has been contributed in unequal shares; and also in the case of mortgages, although this last point is now subject to a provision in the Conveyancing Act 1881[4] that, unless the money is expressed to be advanced in 10. Equality is Equity.

[1] Smith's Manual, 20.
[2] *Overton* v. *Banister*, 3 Hare, 503. See also *Newman* v. *Pinto*, 57 L. T., 31.
[3] *Morley* v. *Bird*, Tudor's Lead. C. Convyg., 876.
[4] 44 & 45 Vict., c. 41, sec. 61.

shares, the surviving mortgagee can, on payment off, give a valid receipt for the mortgage money. This, however, does not alter the fact that, as between themselves, the mortgagees are by force of this maxim tenants in common.[1]

11. Equity acts *in personam*.

11.—*Equity acts in personam.*—The Courts of Law enforced their judgments *in rem, e.g.*, by writs of *fi. fa.* or *elegit*, but the Court of Chancery could always enforce its decrees *in personam, e.g.*, by attachment. Equity acts, in fact, directly on the person, a matter which is well shown by the case of *Penn* v. *Lord Baltimore*.[2] In that case the plaintiff and defendant, being in England, had entered into articles for settling the boundaries of two provinces in America—Pennsylvania and Maryland—and the plaintiff sought specific performance of the articles. The principal objection was that the property was out of the jurisdiction of the Court, but it was held that the plaintiff was entitled to specific performance ; for though the Court had no original jurisdiction on the direct question of the rights as to the boundaries, the property being abroad, yet that did not matter, as the suit was founded on the articles, and the defendant was here, and the Court acted *in personam*. In this case Lord Hardwicke stated the matter very plainly in the following language :—" The strict primary decree in this Court as a Court of Equity is *in personam*, and although the Court cannot in the case of lands situate without the jurisdiction of the Court issue execution *in rem*, *e.g.*, by *elegit*, still I can enforce the judgment of the Court, which is *in personam*, by process *in personam*, *e.g.*, by attachment of the person, when the person

Penn v. *Lord Baltimore*.

[1] See hereon, *Lake* v. *Gibson*, *Lake* v. *Craddock*, 2 Wh. & Tu., 952.

[2] 1 Wh. & Tu., 755. See also *Ewing* v. *Orr-Ewing*, 10 App. Ca., 453; Brett's Eq. Cas., 1—an administration action entertained because the executors lived in England, though testator was domiciled and his property situate in Scotland.

is within the jurisdiction, and also by sequestration, so far as there are goods and lands of the defendant within the jurisdiction of the Court, until he does comply with the judgment of the Court, which is against himself personally to do, or cause to be done, or abstain from doing, some act. In accordance with this the Court is in the habit of entertaining actions for accounts of rents and profits, and specific performance, and injunctions, and for foreclosure of mortgages, regarding lands situate abroad, provided that the title to lands is not in question."

12. *Vigilantibus non dormientibus*

12.—*Vigilantibus non dormientibus æquitas subvenit.*—This means that the Court discountenances laches, and, irrespective of the Statutes of Limitation, will refuse to give relief to a party who has lain by for a long time without attempting to enforce his rights. It is specially important to understand this maxim properly, otherwise confusion will exist in the reader's mind between its application and the rules laid down by the Statutes of Limitation. Now, legal rights are governed by the Statutes of Limitation, and proceedings to enforce such legal rights must be taken within the periods laid down by those Statutes, and can be taken at any time during such periods; but there must be some guiding rule to regulate equitable rights, to which those Statutes do not apply, *e.g.*, claims by a *cestui que trust* against his trustee for a fraudulent breach of trust to which he was party or privy.[1] Again, although a person may have a legal right capable of being enforced at Law, yet he may come to Equity to get that better relief which happens there to be given, *e.g.*, he may prefer to come to Equity to get specific performance of a contract, rather than bring

12. *Vigilantibus non dormientibus æquitas subvenit.*

Meaning of this maxim.

[1] See 51 & 52 Vict., c. 59 (Trustee Act 1888), sec. 8, and *post*, pp. 103, 104.

his action at law for damages. Now, in all these cases the Court says that the person seeking its special assistance must have been active in his movements; there is no hard and fast rule as to the time within which he must come; all that must depend on the circumstances of each particular case, but if the Court is of opinion that, with his rights before him, he has been guilty of sloth or laches, the Court will refuse to extend to him the assistance which would otherwise be afforded by the general principles of Equity, and will leave him to the remedy (if any) which the rules of Law accord to him.[1]

Laches and the Statutes of Limitation.

It will, therefore, be seen that where the rights are matters not governed by the Statutes of Limitation, the maxim now under consideration is the only guiding principle. When the Statutes of Limitation apply, then in so far as there are legal rights being enforced, those statutes entirely govern; but if there is a special equitable relief sought, then, though the Court is governed by the Statutes of Limitation to the extent that it cannot go beyond them, yet it may stop short of them, and refuse the equitable relief on the ground of laches, although the statutory period has not elapsed. The fact that laches does not affect legal rights and remedies where they are not barred by the Statutes of Limitation, is well shown in the case of *Re Maddever*.[2] That was an action brought by a creditor to set aside a conveyance as a fraud upon creditors under 13 Eliz., c. 5, ten years after the execution of the deed, and a considerable time after he had known all about it. It was argued that the plaintiff's laches barred his rights, but the Court held that the creditor, having a *legal* right of action

Re Maddever.

[1] See *Nutt* v. *Easton* (1900), 1 Ch., 29; 69 L. J., Ch., 46; 81 L. T., 530.

[2] 27 Ch. D., 523; 53 L. J., Ch., 998; 52 L. T., 35.

which was not barred by the Statutes of Limitation, was entitled to have the deed set aside. But take a case to which the Statutes of Limitation have no application, and the maxim is the sole governing principle. Suppose A, who occupies some position of confidence or influence over B, gets B to make a settlement upon him, and then B, after several years, comes to the Court to set it aside, on the ground of constructive fraud. Here, if the position of confidence or influence has ended for some time, and B, without good reason, has thus delayed for a considerable space of time to bring his action, the Court will undoubtedly refuse to assist him.[1] Delay has defeated his Equity to relief.

Claims against a married woman's separate estate.

It has been held that a claim for an ordinary debt against the separate estate of a married woman is not in the nature of a merely equitable right only, so as to be governed solely by the principle of laches, and an application of the maxim now under consideration; but that, by analogy, the Statutes of Limitation apply, so as to bar a claim against the woman's separate estate after the statutory period.[2] And it has been held that where a liquidator seeks to recover from directors of a company assets improperly applied by them, the directors are entitled to plead the Statutes of Limitation as a defence in any case where trustees could do so under the Trustee Act 1888.[3]

Claims against directors of a company.

The maxims of Equity may have to be considered in any Division of the Court.

Such, then, are the maxims of Equity, some one or more of which will be found practically underlying

[1] *Allcard* v. *Skinner*, 36 Ch. D., 144; 56 L. J., Ch., 1052; 56 L. T., 61; *post*, pp. 256, 257.

[2] *Re Hastings Estate, Hallett* v. *Hastings*, 35 Ch. D., 94; 56 L. J., Ch., 631; 57 L. T., 126.

[3] *Re Lands Allotment Company, Limited* (1894), 1 Ch., 616, 63 L. J., Ch., 291; 70 L. T., 286. See further as to laches, *post*, pp. 104, 105.

every doctrine of Equity. As the student peruses this work, and considers the various doctrines, he should endeavour to connect them with the appropriate maxim or maxims. In conclusion, we ought to point out to the student that, as Common Law and Equity are now fused, the principles embodied in any of these maxims may possibly come into play in any Division of the High Court. The question is not the Division in which relief is being sought, but the principle upon which it is sought, or the nature of the remedy which is desired. It may be that the matter is one involving strict legal rights and legal remedies, and, if so, reference to these maxims of Equity is not necessary; but it may be that equitable principles are involved, or an equitable remedy is sought, and then these maxims must be regarded. It must be remembered also, that where the rules of Law and Equity clash, the rules of Equity prevail.[1]

[1] 36 & 37 Vict., c. 66, sec. 25.

CHAPTER III.

THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE.

The modern substitute for the old Court of Chancery.

THE Court of Chancery, as a separate and distinct tribunal, no longer exists, its modern substitute being the Chancery Division of the High Court of Justice, and it will be well to shortly consider the constitution of that Court, and some of the provisions made by the Judicature Act 1873,[1] which effected the fusion of Law and Equity.

Many steps had been taken, prior to the Judicature Act 1873, towards the fusion of Law and Equity, but complete unison was only accomplished by that Act. The previously existing Courts are now moulded into one, called the Supreme Court of Judicature, consisting of two parts, the High Court of Justice, and the Court of Appeal. The High Court is now divided into three sections :—(1) The Chancery Division, (2) the King's Bench Division, and (3) the Probate, Divorce, and Admiralty Division; and, in the first of these divisions, are specially meant to be considered and adjudicated upon, all such matters as were formerly specially dealt with in the Court of Chancery. Section 34 of the Judicature Act 1873 in fact assigns to the exclusive jurisdiction of the Chancery Division the following matters :—

Matters now assigned to the exclusive jurisdiction of the Chancery Division.

(1) All causes and matters pending in the Court of Chancery at the commencement of this Act (1st November, 1875).

[1] 36 & 37 Vict., c. 66.

(2) All causes and matters to be commenced after 1st November, 1875, under any Act of Parliament by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery, or to any Judges or Judge thereof respectively, except appeals from County Courts.

(3) All causes and matters for any of the following purposes :—

- Administration of the estates of deceased persons ;
- Dissolution of partnerships, or the taking of partnership or other accounts ;
- Redemption or foreclosure of mortgages ;
- Raising of portions, or other charges, on land ;
- Sale and distribution of the proceeds of property subject to any lien or charge ;
- Execution of trusts, charitable or private ;
- Rectification or setting aside or cancellation of deeds or other written instruments ;
- Specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;
- Partition or sale of real estates ;
- Wardship of infants, and the care of infants' estates.

This is an arrangement for convenience.

But let it be borne in mind that this is a regulation made for the sake of convenience only, so as to have particular classes of matters dealt with in particular Divisions. To commence an action in the wrong Division is not in any way fatal ; it may be retained in that Division, or transferred to the right Division,[1] a very different state of things to what prevailed

[1] 36 & 37 Vict., c. 66, sec. 11.

before the Judicature Acts, for then it was fatal to go to the wrong Court.

In order, however, to complete the idea of fusion, it was also necessary to go a step further and deal with the conflict that existed in certain cases between the rules of Law and Equity. The Judicature Act 1873, therefore, provided that in every civil cause or matter commenced in the High Court of Justice, Law and Equity shall be administered concurrently by the High Court and the Court of Appeal, and that these Courts shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities, in the same manner in which the Court of Chancery would formerly have done.[1] This statute also provided that, in various instances in which there had previously been a conflict between the rules of Law and Equity, the rules of Equity should thenceforth prevail, and there is, in addition to particular instances mentioned in the Act, a general provision to that effect.[2]

Conflicting rules of Law and Equity.

The rules of Equity now prevail.

In the following pages of this work an arrangement is adopted under which we bring before the reader, firstly, those matters specially referred to the exclusive jurisdiction of the Chancery Division by section 34 of the Judicature Act 1873, and, secondly, other particular doctrines of Equity.

[1] 36 & 37 Vict., c. 66, sec. 24.
[2] *Ibid*, sec. 25, as amended by 38 & 39 Vict., c. 77, sec. 10.

PART II.

MATTERS SPECIALLY ASSIGNED TO THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE BY THE JUDICATURE ACT 1873.

CHAPTER I.

OF TRUSTS.

Definitions of a trust.

A TRUST is capable of being defined in a double sense, for, firstly, it may be regarded and defined with reference to the position and interest of the *cestui que trust*, and, secondly, with reference to the position of the trustee. Regarded in the first way, it may be defined as the beneficial interest in, or ownership of, real or personal property, unconnected with the possessory and legal ownership thereof.[1] Regarded in the second way, it may be defined as an equitable obligation under which a person, in whom property is vested, is bound to deal with, or to supervise the dealing with, the beneficial interest in that property in a particular manner and for a particular purpose, either wholly in favour of another or others, or partially in favour of another or others conjointly with himself.[2] The person creating the trust is styled the settlor, the person having the duties to perform, the trustee, and the person for whose benefit it is intended, the *cestui que trust* or beneficiary.

Division of trusts.

Trusts may be created either by act *inter vivos*, or by will, and are divided generally into: (1) Express

[1] Smith's Manual, 99.
[2] Underhill's Trusts, 1, 2.

trusts; (2) Implied trusts; and (3) Constructive trusts. The most important of these three classes of trusts are naturally those properly comprised in the first description, and, in a prefatory way, it is necessary to first consider shortly the history of the modern doctrine of trusts.

History of the modern doctrine of trusts.

Prior to the passing of the Statute of Uses it had for a long time been common to convey lands to uses, for great advantages were gained thereby. Thus, a will could not be made of lands, but it could be made of the use; the land itself was liable to be forfeited for treason, but a mere use was not; the land could not be conveyed to a charity, but the use could; and, bearing these prominent points in mind, it is not to be wondered at that the greater part of the lands throughout the country were conveyed to uses. The owner of a use in land, therefore, at that time was the beneficiary. Personal property was then, comparatively, of little legal importance, and trusts of personalty need not, therefore, at present, be considered. Now the object and design of the Statute of Uses[1] was to put an end to the practice of conveying lands to uses—in other words, to prevent one man holding lands simply for the benefit of another; and that Statute attempted to carry out this design by a bare enactment that when one man held lands to the use, trust, or confidence of another, he who had such use, trust, or confidence should be deemed in lawful seisin and possession of the actual estate. It was thought that the natural result would be that the owner of the use or benefit would be thus rendered the absolute owner in every sense. This Statute, of course, only applied to real estate, for it was not necessary to legislate as to personalty through its little legal importance, nor,

[1] 27 Henry VIII., c. 10.

indeed, could there be any objection to one man holding personalty in trust for another, the chief objection as to land being, indeed, the defrauding the lords of their dues.

Tyrrell's Case.

The Statute of Uses turned out to be an insufficient enactment. *Tyrrell's* Case[1] decided that there could not be a use upon a use, that is to say, that where land was given to A to the use of B to the use of C, the Statute only executed the first use and no other, so that under this decision, in the instance just given, B would be entitled to the property, although it was manifest that C was the person meant to benefit. It was mainly this decision which really gave rise to our modern idea of trusts, for upon this the Court of Chancery stepped in, and held that, though the owner of the first use did take the legal estate, yet he held it only for the benefit of the person who had the last use, so that in the above instance B would be constituted a trustee for C. This is the true state of the case at the present day.

Effect of the Statute of Uses.

In a certain sense, therefore, it is not altogether inaccurate to state that the effect of the Statute of Uses was simply to cause to be added to every conveyance of freeholds the words "to the use of," for, whereas, before the Statute, if A was meant to hold for the benefit of B, A would have been enfeoffed to the use of B, all that was afterwards required to be done was to make the feoffment unto and to the use of A to the use of B, and the same result was arrived at.

Practical explanation.

From what has been stated, it will be gathered that, as a general rule, the owner of the first use has the legal estate in freeholds; if there is no subsequent use he generally has the beneficial interest also, but if there is a subsequent use, then the person taking that

[1] Tudor's Lead. C. Convyg., 335.

subsequent use is the beneficiary. If there are several uses, the first gives the legal estate, and the last gives the beneficial interest, any intermediate ones being simply, as it were, struck out. But, though all this is correct generally, yet it is not always so, for, though land is given to one to the use of another, and therefore primarily it would appear that this latter person has the legal estate, yet if the first person named has an active duty to perform, the legal estate is in him, for the Statute has been always held to be inoperative in such a case. Thus, if land is given to A in trust to collect the rents and hold them to the use of B, here A, having an active duty to perform, has the legal estate, and B the equitable.[1]

Barker v. *Greenwood.*

There is little to explain with regard to the origin of trusts of personalty. As to these the Statute of Uses has no application, and it is always simply a question of whether property has, in express terms or by necessary implication, been vested in one person to hold for another. If it has, then there is a trust.

Trusts of personalty.

All property, real or personal, legal or equitable, at home or abroad, and whether in possession or action, remainder or reversion, or in expectancy, may be made the subject of a trust—unless the policy of the law, or any statutory enactment, prohibits the settlor from parting with the beneficial interest in it, or, in the case of real estate, unless the tenure under which it is held is inconsistent with the trust sought to be created.[2] Thus, though a pension for past services may be aliened, a pension for supporting the grantee in the performance of present or future

What property may be the subject of a trust.

[1] *Barker* v. *Greenwood*, 4 M. & W., 429.
[2] Underhill's Trusts, 44.

duties is inalienable[1]; and where, with respect to copyholds, there is in the manor no custom to entail, an equitable estate tail cannot be created by way of trust.[2] The objects of every trust must also be in accordance with law, and must not be contrary to public policy or morality, and must not exceed the rule against perpetuities, or infringe the provisions of the Thellusson Act.[3]

The objects of trusts must not be illegal.

Having thus somewhat explained the early position with regard to trusts, and noticed what property may be the subject of a trust, we now give the definition of an express trust as one which is clearly expressed by the author thereof, or may fairly be collected from a written instrument.[4] The latter part of this definition needs some explanation. It means that where a person has used words ambiguous in themselves, but recommending or desiring a certain thing, then, provided (1) the subject matter is certain, (2) the object is certain, and (3) upon a construction of the entire instrument the intention appears to have been to use the words in an imperative, and not merely in a discretionary sense, a binding trust is created which is styled a precatory trust.[5] The three points above mentioned must be carefully observed, for if one of them is wanting there is no binding trust, and they may be said to be the essentials to every express trust.[6] The cases on the subject of precatory trusts are numerous, and it is difficult, if not impossible, to reconcile all of them, but there is no doubt that the tendency of modern decisions is against construing precatory words as creating binding trusts, and rather to leave them as a wish

Definition of an express trust.

Three essentials to constitute a trust.

Precatory trusts.

[1] *Davis* v. *Duke of Marlborough*, 1 Sw., 74.
[2] *Allen* v. *Bewsey*, 7 Ch. D., 466.
[3] 39 & 40 Geo. III., c. 98, amended by 55 & 56 Vict., c. 58. See also as to Superstitious Trusts, *post*, pp. 63-65.
[4] Smith's Manual, 99.
[5] Underhill's Trusts, 14, 23.
[6] *Knight* v. *Knight*, 3 Beav., 172.

or desire and nothing more. Thus, in one case a testatrix gave all her property to her daughter E, and continued: "It is my desire that E allows to G an annuity of £25 for her life, and that G shall, if she desire it, have the use of such portions of my household furniture as may not be required by E." E paid the annuity for several years, and then discontinued it, and on G suing to enforce payment of it, the Court of Appeal held that the will did not create a trust or charge in favour of G, but that E took absolutely, subject to a request, which was not obligatory on her.[1] In another recent case, a testator gave his estate absolutely to his wife, in the fullest confidence that she would carry out his wishes in the following particulars, viz.: that she would pay the premiums on a £1,000 life policy belonging to herself, and leave by her will the policy moneys, and a certain sum of £300, to his daughter. The Court of Appeal held that no trust was created in favour of the daughter, and they reiterated the principle that, in order to determine whether a precatory trust is created, the whole will must be considered, and unless it appears from the whole will that an obligation was intended, no trust is created.[2]

Re Diggles, Gregory v. *Edmondson.*

Re Williams, Williams v. *Williams.*

In *Comiskey* v. *Hanbury*,[3] a wealthy testator left all his real and personal estate to his wife "absolutely in full confidence that she will make such use of it as I should myself, and that at her death she

Comiskey v. *Hanbury.*

[1] *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D., 253; 59 L. T., 884. See also *Re Oldfield* (1904), 1 Ch., 549; 73 L. J., Ch., 433; 90 L. T., 392.

[2] *Re Williams, Williams* v. *Williams* (1897), 2 Ch., 12; 66 L. J., Ch., 485; 76 L. T., 600. See also *Re Hamilton, Trench* v. *Hamilton* (1895), 2 Ch., 370; 64 L. J., Ch., 365; 72 L. T., 748; *Mussoorie Bank* v. *Rayner*, L. R., 7 App. Ca., 321; 51 L. J., P. C., 72; *McCormick* v. *Grogan*, L. R., 4 H. L., 82; *Re Adams & Kensington Vestry*, 24 Ch. D., 199; 54 L., Ch., 87; 51 L. T., 382.

[3] *Comiskey* v. *Bowring Hanbury* (1905), A. C., 84; 74 L J, Ch., 263; 92 L. T., 241.

will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among my surviving nieces." The House of Lords held that the words "in full confidence" may, or may not, create a trust according to the context of the particular will. And in this will, it was held that the widow took absolutely, subject to a conditional executory limitation to such of the seven nieces as should be alive at her death, in case she fails to make a will appointing the property to one or more of such nieces. The gift over in default of a testamentary appointment by the widow is the feature which distinguishes this case from those in which the absence of such a gift over has been treated as a strong reason for holding that the words "in confidence," or similar words, do not create an obligatory trust.

When writing necessary to create a trust.

A trust of pure personalty (unless testamentary) may be validly created by word of mouth, but it is always advisable to use signed writing or a deed. Express trusts of land (unless testamentary) must be proved by writing signed by the settlor, under section 7 of the Statute of Frauds[1]; and it has been held that this applies even in the case of lands situated abroad.[2] Testamentary trusts must be created by will or codicil duly executed.[3] But the Court will not allow a statute to be made the implement of fraud, and it is fraud on the part of a person to whom land is conveyed as a trustee, and who knows it to have been so conveyed, to deny the trust

[1] 29 Car. II., c. 3.
[2] *Rochefoucauld* v. *Boustead* (1897), 1 Ch., 196; 66 L. J., Ch., 74; 75 L. T., 502.
[3] 1 Vict., c. 26.

and claim the land. Consequently, notwithstanding the 7th section of the Statute of Frauds, it is competent for a person claiming land conveyed to another, to prove by oral evidence that it was so conveyed on trust, and that the grantee, knowing the facts, is denying the trust.[1] And it is on this principle that secret trusts are enforceable against a devisee or legatee.[2] An assignment of *any* existing trust must, under the 9th section of the Statute of Frauds, always be in writing; this, however, has no application to trusts arising merely by implication or construction of law. *Rochefoucauld* v. *Boustead.*

Any trust arising under a will is naturally a voluntary trust, that is, the *cestui que trust* is merely an object of the testator's bounty; but a trust created by act *inter vivos* may be either of a voluntary nature or it may be based on value. With regard to voluntary trusts arising by act *inter vivos*, the principle of the leading case of *Ellison* v. *Ellison*[3] must be observed, viz., that such a voluntary trust must, to be binding, be a perfect and complete trust, and that if it is in any way imperfect or incomplete, the settlor can draw back from it, and it cannot be enforced.[4] This rule applies not only to trusts properly so called, but also to all voluntary assignments and dispositions made otherwise than by will. Any voluntary disposition, therefore, to be binding, must be made in one of the three following ways: (1) The donor or settlor must actually transfer the property to the beneficiary, or (2) He must actually transfer it to a trustee for the beneficiary, or (3) He must declare that he himself holds the property in Voluntary trusts. *Ellison* v. *Ellison.*

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[1] *Rochefoucauld* v. *Boustead* (1897), 1 Ch., 196; 66 L. J., Ch., 74; 75 L. T., 502.
[2] See *post*, p. 50.
[3] 2 Wh. & Tu., 835.
[4] See also *Green* v. *Paterson*, 32 Ch. D., 95; 54 L. T., 738.

trust for the beneficiary.[1] That is to say, there must either be a complete and perfect assignment, or a complete and perfect trust, and nothing remaining to be done to give effect to it. Thus, in one case, a father executed a settlement by which he voluntarily settled certain freeholds by conveying them to trustees in trust for his daughter, and he covenanted to surrender certain copyholds on the same trusts. He died without having surrendered the copyholds, and it was held that the settlement was only effectual as regarded the freeholds, for there yet remained something to be done as to the copyholds, viz., surrender and admittance.[2] In another case a father, desiring that his daughter should have his shares in a company, endorsed upon his certificate for the shares a memorandum as follows:—"I hereby assign to my daughter all my right, title, and interest," &c., &c. It was held that this was only an imperfect gift, and could not be enforced by the daughter; there was in fact a *locus pœnitentiæ* still existing in the donor until a proper assignment had been made and entered in the books of the company.[3] Yet here it may be remarked, that had the father simply declared himself to be a trustee for his daughter, a binding and effectual trust would have been created. In another case, A, being possessed of leasehold property, endorsed on the lease and signed a memorandum as follows:—"This deed and all belonging to it I give to B." It was held that there being no proper assignment of the house to B, and no proper declaration of a trust, there was a *locus pœnitentiæ*, and that B took nothing.[4]

Jefferys v. *Jefferys.*

Antrobus v. *Smith.*

Richards v. *Delbridge.*

[1] *Milroy* v. *Lord*, 4 De G. F. & J., 264.

[2] *Jefferys* v. *Jefferys*, Cr. & Ph., 138.

[3] *Antrobus* v. *Smith*, 12 Ves., 39. Compare with this case and distinguish *Griffin* v. *Griffin* (1899), 1 Ch., 408; 68 L. J., Ch., 220; 79 L. T., 442, where it was held that the endorsement and delivery of a banker's deposit receipt was a complete gift, although the donee did not get it cashed, or even give notice to the bank, before the donor's death.

[4] *Richards* v. *Delbridge*, L. R., 18 Eq., 11; 43 L. J., Ch., 459; Brett's Eq. Cas., 20.

Irrevocability of a complete trust.

But if a trust or assignment, even though voluntary, is actually completed so that nothing remains to be done to give effect to it, there is then no further *locus pœnitentiæ*, and it is absolutely irrevocable unless a power of revocation is reserved.[1] It is not always easy to determine whether an assignment is absolutely complete and perfect so that this rule applies. Thus, in one case P by voluntary settlement assigned to trustees certain debts specified in the schedule thereto owing to him on the security of certain bills of sale in such schedule also specified, and all interest thereon respectively, and he directed the trustees to get in the debts, and empowered them to do whatever was necessary for that purpose. The settlement contained no express assignment of either the bills of sale, or of the chattels comprised in them, and no notice of the assignment of the debts was ever given during P's lifetime to the debtors, and as a consequence they paid the debts to P, who died without having paid over the amount to the trustees. The redemption clause in each bill of sale provided that it should be void on payment of the debt, so that no reassignment of the chattels was necessary.[2] It was held that the settlement amounted to a complete assignment of the debts, that the fact that notice of the assignment was not given to the debtors did not make the gift incomplete, and that P's estate was liable to account to the trustees of the settlement for the amount of the debts that he had got in.[3]

Re Patrick, Bills v. *Tatham*

Whether there is a duty to point out irrevocability.

Bearing in mind that a complete and perfect voluntary settlement is irrevocable, it is generally

[1] *Henry* v. *Armstrong*, 18 Ch. D., 668 ; 44 L. T., 918.

[2] This distinguished *Re Patrick* from *Bizzey* v. *Flight*, 45 L. J., Ch., 852, in which A assigned, by way of voluntary settlement, certain mortgage debts on land, but did not transfer the mortgages, and it was held the settlement was consequently incomplete and void.

[3] *Re Patrick, Bills* v. *Tatham* (1891), 1 Ch., 82 ; 60 L. J., Ch., 111 63 L. T., 752.

the duty of a solicitor preparing any such instrument to point out to the party making it its irrevocable character, and if this is not done it may sometimes be set aside, or rectified, on the ground of mistake; and a solicitor may be liable for negligence or breach of duty towards his client in not having pointed out that the instrument was irrevocable, and advised or suggested the insertion of a power of revocation. This, however, must depend on the circumstances of each particular case, for some settlements, though voluntary, may manifestly be intended to be irrevocable, as where the settlement is communicated to the beneficiary, who, by reason of it, alters his position in life, and, therefore, has a right to expect that the provision made for him shall not afterwards be taken away.[1]

Trust for creditors known as an illusory trust.

But there is one exception to the rule that a complete disposition is irrevocable, and that is a trust or assignment for the benefit of creditors generally, for this is in fact an illusory trust, that is, a trust in name only, it really being a disposition merely for the benefit or convenience of the settlor. The so-called settlor, in fact, merely creates an agency which, like other agencies, is liable to be revoked; the deed is but a mandate, just as when a man gives his servant money with directions to pay a debt, that does not of itself create any right in favour of the creditor, but the right of disposition still remains in the person who has put the money in the hands of the servant. Such a disposition, therefore, is revocable until payment to the creditor, unless, indeed, the creditor is a party to it, or it has been communicated to him, and he has exercised forbearance by reason of it, or has in some way

[1] *Phillips* v. *Mullings*, L. R., 7 Ch., 244; 41 L. J., Ch., 211; *James* v. *Couchman*, 29 Ch. D., 212; 54 L. J., Ch., 838; 52 L. T., 344.

acquiesced in, or acted under, its provisions. If this is the case, what was originally but a mandate or authority is transformed into a trust, and, like any other complete trust, is binding.[1] But a trust to pay certain named creditors is *prima facie* irrevocable[2]; so also if the trust is to pay creditors generally, but other trusts are declared of the surplus.[3] Where a debtor absolutely assigned his property to trustees upon trust for realization, and to divide the same amongst his creditors in rateable proportions according to the amounts of their respective debts, and the creditors having executed the deed, and the realization having been made, there was a surplus after paying all creditors in full, it was held that the debtor had no right to this surplus, but that the deed constituted a complete and absolute assignment, and that the creditors took the surplus in rateable proportions according to the amounts of their respective debts.[4] If, however, a debtor assigns property to trustees upon trust thereout to pay his debts, there is a resulting trust of any surplus to the debtor.[5]

What becomes of any surplus under such a trust.

The Court will cancel a trust at the request of the settlor or his representatives if the object for which the trust was created has failed, *e.g.*, if a man makes an ante-nuptial settlement but the marriage falls through.[6] The Court will also cancel or rectify a trust created in mistake[7] or procured by fraud or undue influence,[8] if there has been no acquiescence,

Court will sometimes cancel trust at settlor's request.

[1] *Garrard* v. *Lauderdale*, 2 Russ. & My., 451; *John* v. *James*, 8 Ch. D., 744; Brett's Eq. Cas., 59.
[2] *New* v. *Hunting* (1897), 2 Q. B., 19; 66 L. J., Q. B., 554; 76 L. T., 742.
[3] *Godfrey* v. *Poole*, 13 A. C., 497; 57 L. J., P. C., 78; 58 L. T., 685.
[4] *Smith* v. *Cooke* (1891), A. C., 297; 60 L. J., Ch., 607; 65 L. T., 1.
[5] *King* v. *Dennison*, 1 V. & B., 279. See also Underhill's Trusts, 113.
[6] *Bond* v. *Walford*, 32 Ch. D., 238; 55 L. J., Ch., 667; 54 L. T., 672.
[7] *James* v. *Couchman*, 29 Ch. D., 212; 54 L. J., Ch., 838; 52 L. T., 334.
[8] *Cavendish* v. *Strutt*, 19 T. L. R., 483.

and the parties can be restored to their original position.[1]

Ways in which a trust is liable to be defeated.

13 Eliz., c. 5.

Bankruptcy Act 1883.

27 Eliz. c., 4.

Voluntary Conveyances Act 1893.

But notwithstanding the direct irrevocability of a trust at the instance of the settlor, the beneficiaries thereunder are liable under certain circumstances to lose their benefits for, firstly, the Statute 13 Eliz., c. 5, provides that all dispositions made for the purpose of hindering, defeating, or defrauding creditors shall be void unless made *bonâ fide* for good consideration; and, secondly, the Bankruptcy Act 1883[2] enacts that if a person who has made a voluntary settlement or disposition becomes bankrupt within two years, such settlement or disposition shall be void, and even after two but within ten years it shall also be void unless complete solvency on the part of the settlor at the time of making the settlement can be shown, and also that the interest of the settlor in the property passed to the trustees of the settlement on the execution thereof. It was also provided by the Statute 27 Eliz., c. 4, that all voluntary settlements and dispositions of land (which included leaseholds) should be void against a subsequent *bonâ fide* purchaser for value; but this is no longer the law, it having been provided by the Voluntary Conveyances Act 1893[3] that no voluntary conveyance of land, whether made before or after that Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be void under 27 Eliz., c. 4, by reason of any subsequent purchase for value, or be

[1] *Turner* v. *Collins*, 41 L. J., Ch., 558; *Allcard* v. *Skinner*, 56 L. J., Ch., 1052.

[2] 46 & 47 Vict., c. 52, sec. 47. This enactment only makes the settlement void as against the trustee in the bankruptcy, and not void altogether, so that if after creditors have received 20s. in the £ there is a surplus of the property comprised in the settlement, that belongs to the trustees of the settlement for the purposes of the settlement, and not to the settlor (*Re Sims, Ex parte Sheffield*, 45 W. R., 189).

[3] 56 & 57 Vict., c. 21.

defeated under any of the provisions of that Act by a conveyance made upon any such purchase.[1] The Voluntary Conveyances Act 1893 does not, however, apply in any case in which the author of a voluntary conveyance of any lands has subsequently, but before the passing of that Act,[2] disposed of or dealt with the same lands to or in favour of a purchaser for value.[3] Furthermore, it must be remembered that voluntary dispositions are always open to a certain amount of suspicion, and may sometimes be set aside by the Court as having been obtained by fraud either actual or constructive.[4]

Fraud under 13 Eliz., c. 5.

With regard to the first of the above circumstances under which a trust is liable to be defeated, viz., by reason of the provisions of 13 Eliz., c. 5, there is always the possibility of a direct design to defraud having existed, and if this is so the fact of the transaction being for valuable consideration cannot support it. Thus, in one case, an ante-nuptial settlement was set aside under the following circumstances:—The settlor had prior to marriage cohabited with the lady whom he married, and in whose favour he made the settlement. The lady admitted that she did not particularly care for the marriage; that she knew there was a judgment against the settlor, and generally was acquainted with his affairs; and that she married him that he might, through the settlement, have something left for his old age. It was held by the Court of Appeal that the only object of the marriage was, under cover of the relationship of husband and wife, to put the husband's property out of the reach of his creditors, and that the settlement was therefore a fraud upon them, and

Re Pennington

[1] 56 & 57 Vict., c. 21, sec. 2.
[2] 29th June, 1893.
[3] Sec. 3.
[4] See *post*, p. 242.

Re Troughton.

must be set aside.[1] In another case an administratrix with the will annexed was also the residuary legatee of the testator, whose estate comprised shares not fully paid up in a company, and she, after receiving notice of a call, assigned all the estate, except the shares, to a friend in consideration of covenants to indemnify and provide for her. It was decided that the assignment was void against the company, and that they were entitled to payment of the call out of the property so assigned.[2]

Right of creditors as against a voluntary settlement.

But beyond direct design to defraud, a merely voluntary settlement is frequently considered in itself necessarily a fraud upon creditors under the 13 Eliz., c. 5, simply on account of its voluntary character. In considering this point a distinction must, however, be drawn between the position of persons who are creditors at the time of the making of a voluntary settlement, and those who only become creditors afterwards. Practically, the former can always successfully call in question any voluntary settlement, for if they do not get paid, then plainly, as they might have been paid by means of the property comprised in the settlement, they have been hindered and delayed by it, and there is in fact, from the circumstances, evidence of intent to defeat and delay creditors.[3] But what primary right have creditors to complain of a settlement made before they

Spirett v. *Willows.*

[1] *Re Pennington*, 5 Morrell's Bankruptcy Cases, 216. See also *Columbine* v. *Penhall*, 1 Sm. & G., 228; *Bulmer* v. *Hunter*, 38 L. J., Ch., 543.

[2] *Re Troughton, Rent & General Collecting & Estate Management Society* v. *Troughton*, 71 L. T., 427.

[3] *Spirett* v. *Willows*, 34 L. J., Ch., 367; but see *Ex parte Mercer, Re Wise*, 17 Q. B. D., 290; 54 L. T., 720. This case, however, it is submitted, does not alter the general correctness of the above statement, and is clearly distinguishable. There a settlor was solvent, but an action was pending against him for damages for breach of promise of marriage, in which a judgment was afterwards obtained. The plaintiff in such action was not, therefore, strictly a creditor at the time, and the direct decision of the Court was merely that, in the absence of evidence to defeat and delay creditors by making the settlement, it could not be set aside.

became creditors? Ordinarily none; and it has been expressly laid down that where a settlement is made honestly and without any actual intention to defeat or delay creditors, it cannot be avoided under 13 Eliz., c. 5, by any *future* creditors, merely because it prevents them being paid.[1] It may, therefore, be stated as a general rule that subsequent creditors cannot under this statute upset a prior voluntary settlement, but to this rule there are three exceptions, viz.: (1) Where a designed intention to defraud subsequent creditors can be shown; (2) Where the subsequent creditors can show that their money has been applied in paying off debts which existed at the date of the settlement, for here they have an equity to be allowed to stand in the shoes of such prior creditors for the purpose of upsetting the settlement[2]; and (3) Where the settlement was made on the eve of the settlor entering upon some enterprise; and this third exception in fact is almost, if not quite, included in the first, for here there are in the settlor's direct contemplation possible debts and difficulties, and an intention, should such be the case, to delay and defraud creditors.[3] This last exception was forcibly applied in the case of *Ex parte Russell, re Butterworth*.[4] There a baker, who had carried on business for some years, being about to purchase a grocery business, which he intended to carry on together with his own trade, executed a voluntary settlement of nearly the whole of his property upon his wife and children. He afterwards bought the grocery business, and having lost money by it, sold it again after six months for as much as he gave for it, and

Re Lane-Fox.

Freeman v. *Pope.*

Ex parte Russell, re Butterworth.

[1] *Re Lane-Fox, Ex parte Gimblett* (1900), 2 Q. B., 508; 69 L. J., Q. B. 722; 83 L. T., 176.
[2] *Freeman* v. *Pope*, L. R., 5 Ch., 538; 39 L. J., Ch., 689; Brett's Eq. Cas., 53.
[3] *Mackay* v. *Douglas*, L. R., 13 Eq., 106; 41 L. J., Ch., 539.
[4] 19 Ch. D., 588; 51 L. J., Ch., 521; 46 L. T., 113.

continued to carry on his baking business. He became insolvent about three years after making the settlement. The settlement was held void against creditors under the Statute 13 Eliz., c. 5, on the ground that it was evidently executed with a view of putting the settlor's property out of the reach of his creditors, in case he should fail in the speculation on which he was about to enter, viz., the carrying on of a new business of which he knew nothing.

Purchaser without notice of settlement being fraudulent.

In considering the effect of 13 Eliz., c. 5, on voluntary settlements, it must, however, be noticed that, although a settlement may be fraudulent against creditors, a purchaser for value of the property comprised in the settlement, taking without any notice of its fraudulent nature, is protected.[1]

As to effect of 27 Eliz., c. 4.

With regard to the Statute 27 Eliz., c. 4, it is now of but little importance, by reason of the Voluntary Conveyances Act 1893, which practically repeals it, except as regards sales made prior to 29th June, 1893, but it may still be well to notice that its provisions applied, not only to freeholds and copyholds, but also to leaseholds. This, however, was only true in a limited sense, for it was held that a settlement of leaseholds to which liability to pay rent or perform covenants was attached, was, from the very nature of the property, based on value, for the *cestuis que trustent*, as assignees, took upon themselves the liability to pay the rent, and to perform all covenants which ran with the land.[2] It has, however, been held that such value as this is not sufficient to prevent a settlement being considered voluntary, and bad against creditors, under 13 Eliz., c. 5.[3]

[1] 13 Eliz., c. 5, sec. 6. *Halifax Banking Company* v. *Gledhill* (1891), 1 Ch., 31; 60 L. J., Ch., 181; 63 L. T., 623.

[2] *Price* v. *Jenkins*, 5 Ch. D., 619; 46 L. J., Ch., 805; *Harris* v. *Tubb*, 42 Ch. D., 79; 58 L. J., Ch., 434; 60 L. T., 699.

[3] *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D., 74; 52 L. J., Ch., 343.

Volunteers in a settlement based on value.

Having reference to the fact that the Court will not enforce an executory trust raised *inter vivos* at the instance of a volunteer, and having regard also to the Statutes just referred to, it is, manifestly, very important to consider whether a trust is one based upon value, or is merely voluntary. And hereon it must be noticed that although a settlement may, as regards certain of the beneficiaries, be one based on value, yet, as regards others, it may be a voluntary settlement. Thus, an ante-nuptial settlement is based on value, viz., the marriage, but a limitation therein in default of issue to a stranger, or even to the settlor's next-of-kin, is ordinarily voluntary, such persons not being considered to be within the scope of the consideration.[1] The children of a man or woman, whether by a former marriage or illegitimate, are strictly volunteers, and not within the scope of the marriage consideration.[2] There are some cases, however, which seem to decide that the children of a widow by her former marriage, for whom provision is made in articles entered into in contemplation of a second marriage, are not volunteers, and can enforce the carrying out of the trust[3]; but these cases cannot now be considered as binding to that extent, but merely as deciding, on the particular facts, that the interests of the former children were so mixed up with the interests of the possible issue of the contemplated marriage, that they could not well be separated, and on this principle they were treated as being within the marriage consideration, or at least entitled to the benefit of it.[4] The parties at

Children by a former marriage.

[1] *De Mestre* v. *West* (1891), A. C., 264; 60 L. J., P. C., 66; 64 L. T., 375, over-ruling *Clark* v. *Wright*, 6 H. & N., 849.

[2] *Attorney General* v. *Jacobs-Smith* (1895), 2 Q. B., 341; 64 L. J., Q. B., 605; 72 L. T., 714.

[3] *Newstead* v. *Searles*, 1 Atk., 264; *Gale* v. *Gale*, 6 Ch. D., 144; 36 L. T., 690.

[4] *Mackie* v. *Herbertson*, 9 App. Ca., 303; *Attorney General* v. *Jacobs-Smith* (1895), 2 Q. B., 341; 64 L. J., Q. B., 605; 72 L. T., 714.

whose instance an executory trust *inter vivos* will be enforced against the settlor comprise (1) any person who gives a valuable consideration; (2) and the husband, wife, and children of the marriage, where that marriage is the consideration; and (3) trustees for them.

Trusts executed and executory.

An express trust may be either a trust executed, or a trust executory. A trust executed is one which is fully and finally declared by the instrument creating it, one in which the creator of the trust may be said to have been his own conveyancer; but a trust executory is one which, whilst containing an indication or idea of the trust intended, is yet incomplete in its character and requires some other instrument to perfect it. Thus, if A, by his will gives property to B to hold in trust for C, this is a trust executed; but if it were given in trust to be settled on C for life, and then for his children, this would be a trust executory.[1] A trust contained in a marriage settlement is invariably an executed trust, but one contained in marriage articles is a trust executory, for there is another instrument, viz., the settlement, in the contemplation of the parties, and the articles only contain an indication of what is intended.[2] The marriage articles are in fact merely the rough jottings, or heads, of the provisions intended to be formerly embodied in the more complete and detailed settlement.

The marriage articles.

Construction of such trusts.

Apart from the difference in the nature of trusts executed and executory, there is a wide distinction between the construction placed upon each. The maxim "Equity follows the Law" has been already explained,[3] and it has been there stated that the

[1] *Re Ballance, Ballance* v. *Lamphier*, 58 L. J., Ch., 534; 61 L. T., 158.

[2] *Lord Glenorchy* v. *Bosville*, 2 Wh. & Tu., 763.

[3] *Ante*, p. 8.

true meaning of that maxim is well illustrated by the doctrines of the Court with regard to this subject. It is now clearly established that Equity will construe limitations in the nature of executed trusts in the same manner as legal limitations, so that, for instance, if an estate is devised to the use of trustees in trust for A for life with an ultimate remainder in trust for the heirs of A's body, here, the trust being an executed one, the rule in *Shelley's* Case [1] governs the matter, and A takes an estate tail. But executory trusts must be executed in a more careful and accurate manner, and the Court is not bound to construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them.[2]

Distinction between trusts executory arising in marriage articles, and in wills.

The great thing in trusts executory is to arrive at the intention of the creator of the trust, for, having arrived at the intention, then the construction is such as will give effect to it. Hence there is often a material distinction to be observed between a trust executory arising in marriage articles and one arising in a will; for, in the former the intention can be seen from the very nature and well-known design of the instrument, whilst in the latter the intention can only be seen from the words made use of. The design of marriage articles is to benefit the children of the marriage, so that though the limitation therein is to the husband and the heirs of his body, yet he will always take only a life estate; but with the same words in a will, though by trust executory, he would take an estate tail, unless an intention could be gained, from the context, that his interest was to be limited to a life estate only.[3]

[1] Tudor's Lead. C. Convyg., 589.

[2] 1 Wh. & Tu., 19. See *Sackville-West* v. *Viscount Holmesdale*, L. R., 4 H. L., 543; Brett's Eq. Cas., 31.

[3] See *Blackburn* v. *Stables*, 2 V. & B., 369; *Magrath* v. *Morehead*, L. R., 12 Eq., 49; 41 L. J., Ch., 120.

Secret trusts.

There may sometimes be an express trust of a secret nature, that is, where a person gives property to one apparently for his sole benefit, but it is shown, either by admission or other evidence, that there is some secret document, or secret understanding, by which he is required to hold it in trust for another. But where there is thus an attempt to create a secret trust, it is necessary in the first instance to consider whether the secret trust complies with any statutory requirements there may be upon the subject. Thus, if a testator by his will gives property to A, and dies, and leaves a letter or memorandum, not attested as a will, and of which A knows nothing until after the testator's death, directing A to hold the property in trust for B, here there is no valid secret trust created, for this would be in direct contravention of the provisions of the Wills Act 1837, and A can retain the property for his own benefit. But the Court has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud,[1] and if in the machinery for effectuating a fraud an Act of Parliament intervenes, a Court of Equity does not, it is true, set aside the Act of Parliament, but it imposes upon the individual who gets a title under the Act a personal obligation, because he makes use of the Act as an instrument for accomplishing a fraud.[2] Thus, if in the case just put, the testator had in his lifetime communicated to A his intention of leaving his property in this way, and A had expressly or impliedly assented thereto, and thus procured the property to be left in this way, he would be compelled to give effect to the secret trust in so far as it was for a lawful object; and in so far even as the object was not lawful, or for any reason could not be effectual, or completely so, yet

An Act of Parliament must not be used as an instrument of fraud.

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[1] *Ante*, pp. 36, 37.
[2] Per Lord Westbury in *McCormick* v. *Grogan*, L. R., 4 H. L., 82.

he would not be permitted to hold the property for his own benefit, but to this extent he would be compelled to hold it for the benefit of the residuary devisee or legatee, or heir-at-law or next-of-kin, as the case might be.[1]

Re Boyes, Boyes v. *Carritt*.

This subject is well illustrated by *Re Boyes, Boyes* v. *Carritt*.[2] There the testator had bequeathed all his property to Mr. Carritt, who was his solicitor, and who drew the will, and he also appointed him executor. Mr. Carritt admitted that though on the face of the will the whole property was given to him, yet it was quite understood between him and the testator that he should only hold the property as a trustee for certain objects to be thereafter indicated by the testator. Here, therefore, was a clear intention, shown by extraneous evidence, that the legatee was not to take beneficially. The testator left behind him an unattested letter, expressing that Mr. Carritt was to pay over the estate when realised to B. The Court held that the trust for B was ineffectual, because that particular trust had not been communicated to Mr. Carritt and accepted by him, and a devisee or legatee cannot by accepting an indefinite trust of this kind enable a testator to make an unattested codicil; but that, notwithstanding this, as Mr. Carritt was clearly meant to be a trustee, he could not retain the property, but must hold in trust for the next-of-kin of the testator. It was laid down that in order to make a secret trust effectual it is essential that it should be communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust, in which case effect will be given to it; but that a devisee or legatee cannot by accepting a merely

Essentials for a valid secret trust.

[1] *Tee* v. *Ferris*, 2 K. & J., 357.
[2] 26 Ch. D., 531; 53 L. J., Ch., 654; 50 L. T., 581.

indefinite trust practically enable a testator to make an unattested codicil. It will, of course, be observed that in this case if Mr. Carritt had not known that he was not to take beneficially, the letter left by the testator would not have prevented him actually retaining the whole estate for his own benefit had he so desired.

Re Stead, Whitham v. *Andrews.*

It may sometimes happen that property is given to two persons, apparently beneficially, but really they are both meant to be trustees, and one of them is guilty of the necessary conduct to constitute a trusteeship, and the other is not. Certain distinctions have here to be drawn. If the property is given to the two as tenants in common, and a communication is made to one only of them of the trust, it is binding on that one only as to his share, and not on the other as to his.[1] And even if the property is given to the two as joint tenants, and such a communication is made, after the will is executed, to one only of them, then equally it is only binding in the same way on that one; but if, it being a gift in joint tenancy, such a communication is made to one only before the will was executed, then this is binding on both as to the entire property, because the will was procured by fraud, and though the other person was himself innocent of any fraud, yet he cannot be permitted to benefit by it.[2]

Implied and constructive trusts.

Implied and constructive trusts are sometimes classified under the one common head of constructive trusts,[3] and in a sense this is correct, for they are both of them trusts, not raised by any express words,

[1] *Geddis* v. *Semple* (1903), 1 Irish Rep., 73.
[2] *Re Stead, Whitham* v. *Andrews* (1900), 1 Ch., 237; 69 L. J., Ch., 49; 81 L. T., 751; 48 W. R., 221.
[3] See Underhill's Trusts, 109, 110.

but by construction of Equity. Still it is preferable to distinguish between them, and using the words in their strict sense the distinction is plain enough. An implied trust may be defined as one founded on an unexpressed but yet presumable intention.[1] A constructive trust may be defined as one raised by construction of Equity to satisfy the demands of justice, without reference to any presumable intention.[2] That is to say, that whilst an implied trust arises from a consideration of probable intention, a constructive trust arises from a consideration of what is right and just, irrespective of intention. In both cases, the person possessed of the property is compelled to hold it for the benefit of another.

Definitions of implied and constructive trusts.

The principle involved in the leading case of *Dyer* v. *Dyer*[3] furnishes us with an apt instance of an implied trust. Without dealing with the exact facts and decision in that case, the principle is this: A buys property, and instead of having it conveyed to himself, has it conveyed to B, and the result is that, without anything being said, in the absence of any evidence to show the contrary, B holds as a trustee for A. The reason is simple—it is unnatural to suppose that A paid the purchase-money to benefit B; it is much more likely that he took the conveyance in the name of B for some private reason connected with his own convenience; the Court in fact says there is an unexpressed, but yet, under the circumstances, fairly to be presumed, intention that B was meant to hold in trust for A. If, however, in this instance B was the wife or a child of A, or one towards whom he had placed himself in *loco parentis*,

Dyer v. *Dyer*.

[1] Smith's Manual, 128.
[2] *Ibid.*, 145.
[3] 2 Wh. & Tu., 803; see also *Fowkes* v. *Pascoe*, L. R., 10 Ch., 343; Brett's Eq. Cas., 11. For a recent example see *Re Policy* 6402, (1902) 1 Ch., 282; 71 L. J., Ch., 189.

and not otherwise provided for, the same line of argument is not applicable, and the Court considers that it was probably meant that B should benefit, and does not primarily raise a trust. This is purely on the point of probable intention.

Parol evidence to rebut the presumption of trust.

But though a presumption is in the first place raised by the Court either the one way or the other, yet the ultimate position always turns on evidence, for as such a trust arises merely by presumption evidence can always be given to rebut it[1]; and, so also, even if the above-mentioned relationship did exist, evidence can be given to show that a trust was really intended.[2] As to what will be sufficient evidence to rebut the presumption of a trust in the case of a purchase in another's name, any declaration made by the person who paid the purchase-money, whether at the time or subsequently, that he intended the person in whose name the conveyance was taken to hold beneficially, will be sufficient.[3] To rebut the presumption of advancement when the purchase is in the name of a wife or a child, declarations made by the person who paid the purchase-money, either antecedently to or contemporaneously with the transaction, can be given in evidence, but not if made subsequently, for to admit such declarations as these would be to allow the party to manufacture evidence for himself[4]; but the subsequent acts and declarations of the wife or child can be received as evidence to rebut the presumption of advancement,[5] for they are against the party's interest. So also the circumstances may in themselves tend to rebut the presumption of advancement; for instance, it has

Circumstances showing no trust intended.

[1] *Groves* v. *Groves*, 2 Y. & J., 172.
[2] *Grey* v. *Grey*, 2 Swanst., 594; *Marshall* v. *Cruttwell*, L. R., 20 Eq., 328.
[3] *Groves* v. *Groves*, 2 Y. & J., 172.
[4] *Grey* v. *Grey*, 2 Swanst., 594.
[5] *Sidmouth* v. *Sidmouth*, 2 Beav., 455.

been held that the relationship of solicitor and client, existing between the son and the parent, is sufficient for this purpose.[1] In one case a father bought 100 shares in a company in the name of his son, for the purpose of qualifying him as a director, and thus giving him some employment. The son became a director, and received and kept his remuneration as such, but the dividends on the shares he from time to time paid over to his father, who also kept possession of the share certificates. It was held that the shares were purchased in the son's name merely for the purpose of qualifying him as a director, and that the presumption of advancement was therefore rebutted, and the son was only a trustee of the shares for his father.[2] *Re Gooch.*

A widow is a person standing in such a relation to her child as to raise the presumption of advancement in the case of a purchase in the child's name, for she is under an obligation to maintain her children.[3] But it has been held that the presumption of advancement does not arise from the mere purchase by a married woman, out of her separate estate, in the name of a child.[4] The principle of this decision does not appear very sound, and it may be doubted whether it would be followed now, as the Married Women's Property Act 1882[5] makes a married woman's separate estate liable for the maintenance of her children, and there appears therefore to be no good reason for drawing a distinction between the position of a widow and of a married woman.[6] Purchase by a mother in name of child.

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[1] *Garrett* v. *Wilkinson*, 2 D. & S., 244.
[2] *Re Gooch*, *Gooch* v. *Gooch*, 62 L. T., 384.
[3] *Sayre* v. *Hughes*, L. R., 5 Eq., 376; 37 L. J., Ch., 401.
[4] *Re De Visme*, 2 De G. J. & S., 17; *Bennet* v. *Bennet*, 10 Ch. D., 474.
[5] 45 & 46 Vict., c. 75, sec. 21.
[6] See 2 Wh. & Tu., 821-823; Underhill's Trusts, 125-127.

Resulting trusts.

Such a trust as that just under discussion, viz.: where one purchases property in the name of another, besides coming under the heading of an implied trust, is also known as a resulting trust, which may be defined as one in which the equitable interest in any kind of property springs back or results, to a person other than the legal owner, by force of a probable intention. It is, in fact, an implied trust, for it is founded upon an unexpressed but presumable intention. It may occur in the way already pointed out; and also in cases in which a legal estate is given to another, but the equitable interest is not, or is only partially, or ineffectually, given. Thus, A settles property on B in trust for C, who, it turns out, was dead at the time, and the consequence is that B holds for A. The natural implication of A's desire is that, if the object fails, he shall have his property back again, as if he had never created any trust. This seems a necessary consequence, for who else could take, unless, indeed, it was the trustee himself? But it is an absolute rule that, when a trust is clearly shown to have been intended, the trustee cannot take any part of the trust property for his own benefit.[1]

Resulting use.

A resulting trust must not be confused with a resulting use. In a resulting trust it is the beneficial interest in any sort of property which results, whilst in a resulting use it is the legal estate in freeholds which results. A resulting use arises where a person makes a voluntary conveyance of freehold property without declaring any use with regard to it, and therefore the use, with its accompanying legal estate, results, and the grantor is, in fact, again possessed of the same estate as he was before the execution of the conveyance.[2]

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[1] See *Re Boyes*, *Boyes* v. *Carritt*, 26 Ch. D., 531; 53 L. J., Ch., 654; *ante*, p. 51; *Briggs* v. *Penney*, 2 Mac. & G., 546.

[2] See Indermaur & Thwaites' Conveyancing, 50, 51.

Undisposed of residue.

Another instance of an implied trust is found in the case of a will containing no residuary bequest. The personalty is vested in the executor, and originally the position was that the executor was allowed to retain it for his own benefit, unless any intention[1] could be gathered that he was to hold as a trustee for the next-of-kin. There was, in fact, a trust or gift implied for the executor's benefit. But this position has been exactly reversed by the Executors Act 1830, which enacts that the executor shall stand possessed of any undisposed of residue, in trust for the next-of-kin, unless it shall appear that he was intended to take beneficially.[2] The Act does not make the executor an express trustee for the next-of-kin, but an implied or constructive trustee. It, in fact, constructs a trust in favour of the next-of-kin, founded upon an unexpressed, but yet presumable, intention[3]; and whether the Statute of Limitations bars their claims depends to-day on section 8 of the Trustee Act 1888.[4] It should, however, be observed that if there are no next-of-kin, the old rule of an implied gift to the executor still prevails, and he will take in preference to the Crown.[5] Care must be taken to distinguish this statement from the position with regard to a trustee in whom property is vested in trust absolutely for a beneficiary, who dies intestate without relatives. In such a case, if the property were personalty, it always went to the Crown as *bonâ vacantia*, and this is still the case[6]; but if it were realty, then, as the

1 Wm. IV., c. 40.

Re Lacy.

[1] *E.g.* if the will expressly gives a legacy to the executor, or appoints him executor and trustee.

[2] See *Re West, George* v. *Grose* (1900), 1 Ch., 84; 69 L. J., Ch., 71; 81 L. T., 720.

[3] *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd* (1899), 2 Ch., 149; 68 L. J., Ch., 488; 80 L. T., 705.

[4] 51 & 52 Vict., c. 59.

[5] *Re Bacon, Camp* v. *Coe*, 31 Ch. D., 460; 55 L. J., Ch., 368; 54 L. T., 150.

[6] *Re Bond, Panes* v. *Attorney General* (1901), 1 Ch., 15; 70 L. J., Ch., 12; 82 L. T., 612.

legal estate was in the trustee, and there was no one living possessing any equitable rights as against him, he held the property freed from the trust. This, however, is no longer so, the Intestates Estates Act 1884 [1] having provided that incorporeal hereditaments and equitable estates in corporeal hereditaments shall escheat to the Crown, just as legal estates in corporeal hereditaments have always done.

Intestates Estates Act 1884.

Huntingdon v. *Huntingdon*.

Let us take the well-known case of *Huntingdon* v. *Huntingdon*,[2] as one more instance of an implied trust. There the Countess of Huntingdon had, together with her husband, the Earl of Huntingdon, mortgaged her real estate for his purposes, and, he subsequently paying off the mortgage, the property was reconveyed to him. It was held that, nevertheless, it did not form part of the Earl's property, but that substantially it was still the wife's—in other words, though the Earl was possessed of the legal estate in the property, he held only as trustee for his wife. The Court considers, generally, that, when a wife joins with her husband in mortgaging her property for his benefit, she simply charges her estate as surety for him, and that there is existing between the parties an unexpressed but fairly presumable intention that the wife is to have her estate back again freed from the mortgage. However, evidence may be given to show a contrary intention, and it may be, on the special facts of the case, that the wife intended to alter the limitation of the equity of redemption; but the mere fact that the equity of redemption is, in the mortgage, reserved to the husband is not sufficient.[3]

Presumption that money raised for husband's purposes.

It will be observed that, for the principle just mentioned to apply, the money must have been raised

[1] 47 & 48 Vict., c. 71, sec. 4.
[2] 1 Bro. P. C. 1, Toml. Edit.
[3] *Huntingdon* v. *Huntingdon*, 1 Bro. P. C. 1, Toml. Edit.

on the wife's property and applied for the husband's purposes; but when the husband and wife join in mortgaging the wife's property, it is always presumed that this is so unless the contrary can be proved,[1] as it might be by evidence of declarations or statements of the wife that it was not so.[2] Of course, in cases coming within the Married Women's Property Act 1882, there is now no need for the husband to join in a mortgage by the wife of her property, but the position substantially remains the same, for, if it is shown that the mortgage was really effected for his purposes, then he will be bound to indemnify her in respect of it. However, although the money is raised to defray debts which are legally the husband's, it does not necessarily follow that the wife is entitled to indemnity, for it must depend upon the circumstances of each particular case, *e.g.*, if the debts were contracted as a result of a mutually extravagant mode of living, no inference of a right to indemnity will be drawn in her favour.[3]

Instance of constructive trust.

The most striking instance that can be given of a constructive trust, as contrasted with an implied trust, is found in the case of a profit made by a trustee out of his trust estate. If a trustee, directly or indirectly, intentionally or unintentionally, makes a profit, or gains any benefit out of his trust estate, he is held a trustee of such profit. No one can, ordinarily, in such a case suggest that the trustee meant to benefit his *cestui que trust*, so that it is impossible to say that a trust is raised here on the principle of implication of intention; and the fact really is that the Court says it is unjust to let the trustee retain this profit, that it is contrary to fairness, that it would tend to throw temptation in

[1] *Kinnoul* v. *Money*, 3 Swanst., 208.
[2] *Clinton* v. *Hooper*, 1 Ves. Jr., 173.
[3] *Paget* v. *Paget* (1898), 1 Ch., 470; 67 L. J., Ch., 266; 78 L. T., 306.

the way of trustees, and, therefore, the Court raises a trust to satisfy the requirements of justice, without reference to any presumable intention. The leading case of *Keech* v. *Sandford*[1] furnishes us with an extreme instance of this idea. There the lease of Romford Market had been bequeathed to B in trust for an infant. B, before the expiration of the term, applied to the lessor for a renewal of the lease for the benefit of the infant, and this was refused, whereupon B got a lease made to himself, and it was held that B was a trustee of the lease for the infant, and must assign the same to him. The opportunity of getting the lease was afforded by the position of trusteeship, and, indirectly, the trustee did gain an advantage from his trust, which, therefore, he was not allowed to reap the benefit of. This rule, that a trustee cannot make any profit or advantage out of his trust estate, applies to many persons who, though not strictly trustees, yet occupy a fiduciary or quasi-fiduciary position, *e.g.*, directors or promoters of a company, agents, or solicitors.[2]

Keech v. *Sandford.*

Vendor's lien for purchase money.

There are several cases of trust raised by circumstances and not by express words, which are equally trusts, whether regarded in the light of probable intention, or in the light of what is right and just, and they are, perhaps, best classified as constructive trusts. The case of *Mackreth* v. *Symons*,[3] dealing with the subject of a vendor's lien for unpaid purchase-money, furnishes us with an instance of a trust of this character. If a man sells his land and does not get paid his purchase-money, or the whole of it, here the purchaser holds as a trustee for the vendor, to the extent of the unpaid purchase-money. It can

Mackreth v. *Symons.*

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[1] 2 Wh. & Tu., 693.
[2] See also *post*, pp. 254-265.
[3] 2 Wh. & Tu., 926.

well be considered that the vendor could not have meant to part with all control over, or interest in, the property without being paid the purchase-money; and, with equal force, it can also be said that it would be unjust to take away all interest in the property from the vendor, until his purchase-money is paid. This lien arises on a sale of freeholds, copyholds, and leaseholds,[1] and of a share of the proceeds of leaseholds directed in a will to be sold,[2] and of a reversionary interest in a money legacy,[3] and in all cases where the Court would decree specific performance of a contract of sale.[3] It creates an equitable charge upon the property sold; and it carries a claim for interest from the date when the lien arose, which is not barred by any Statute of Limitations or by analogy thereto.[3] The vendor can enforce this trust raised in his favour against everyone, except a *bonâ fide* purchaser for value without notice of the purchase-money being unpaid, who has either acquired the legal estate [4] or has a better equity than the vendor.[5] It is, however, always open to the party against whom the lien is claimed, to show that the vendor has waived or abandoned it, a matter which can be made out either from his express words, or his conduct, which may show that he intended to rely upon some other security or upon the purchaser's personal credit. The mere fact, however, that the vendor has taken some collateral security, is not of itself sufficient, *e.g.*, his taking a collateral mortgage, bond, or promissory note. But, if it appears that what he has taken was really the actual consideration bargained for, and that it was in fact substituted for the consideration money, then the lien is lost.[6]

In what cases lien arises.

Against what persons vendor's lien exists.

How lost.

[1] *Shaw* v. *Foster* (1872), 5 H. L., 321; 42 L. J., Ch., 49.
[2] *Davies* v. *Thomas* (1900), 2 Ch., 462; 69 L. J., Ch., 643.
[3] *Re Stucley*, *Stucley* v. *Kekewich* (1906), 1 Ch., 67; 75 L. J., Ch., 58; 93 L. T., 718.
[4] *Harris* v. *Tubb*, 42 Ch. D., 79; 58 L. J., Ch., 434; 60 L. T., 699.
[5] See *Farrand* v. *Yorkshire Bank* and other cases quoted, *ante*, p. 14.
[6] *Buckland* v. *Pocknell*, 13 Sim., 499.

Doctrine as to equitable waste.

The doctrine of the Court with regard to equitable waste [1] may also be referred to as a further example of a trust which may be said to be raised either by force of probable intention, or by reason of the determination of the Court to enforce right and justice. True, the estate is given to the tenant for life without impeachment for waste, but as an estate is given in remainder it could not have been the intention of the settlor to allow the tenant for life to devastate the estate, and a trust is, therefore, raised in the remainderman's favour, founded on the unexpressed, but yet, under the circumstances, fairly to be presumed intention. Neither would it be just or right to allow the tenant for life to devastate the property.

Private and public or charitable trusts.

In the division of trusts already given, no reference has been made to the sub-division of express trusts into (1) Private or ordinary trusts, and (2) Public or charitable trusts. Both are equally express trusts, and the main object of the sub-division is for the purpose of noting some particular points in which the Court favours the latter. The general rules as to trusts are the same, whether the *cestui que trust* be a private individual or a charitable body, but whilst this is so, the Court views the latter with a specially favourable eye, and this is the great point to be observed in connection with charitable trusts. Particularly it should be noticed that a charitable trust may be of a permanent and indefinite character as regards time, and is not necessarily confined within the limits prescribed to a settlement by way of private trust; in other words, the rule against perpetuities does not affect charitable trusts.[2]

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[1] See *Garth* v. *Cotton*, 2 Wh. & Tu., 970.

[2] Lewin on Trusts, 18. See *Smith* v. *Kerr* (1902), 1 Ch., 774; 71 L. J., Ch., 369; 86 L. T., 477.

What are charitable trusts.

An old Statute[1] of 43 Eliz., c. 4, enumerates what are to be deemed charitable trusts, but many objects have been held charitable though not strictly within the wording of this Act, as yet being within its general scope. It has been stated that every disposition is charitable which has for its object: (1) The relief of the indigent[2]; (2) The advancement of learning; (3) The maintenance or propagation of religion, whether according to the doctrines and rites of the Church of England, or those of the Church of Rome, or of any sect or body of Protestant Nonconformists, or of Jews, or Unitarians; or (4) The promotion of any other useful public purpose.[3] It is not, however, always a very simple matter to determine what is, and what is not, a charitable gift. Thus, it has been held that a legacy to an Anti-vivisection Society, that is, a society having for its object the total abolition of the practice of vivisection, was a gift to a charity, on the principle that the society was a lawful association formed with the intention of encouraging kindness to animals[4]; whilst it has also been held that a legacy to the Yacht Racing Association of Great Britain in order to provide for ever an annual cup to encourage the sport of yacht racing, though it might be beneficial to the public, could not be upheld as charitable.[5]

Re Foveaux.

Re Nottage

Superstitious uses and trusts.

The subject of superstitious uses and trusts must not be confused with that of charitable trusts. A purely superstitious use or trust is one which has

[1] The statute is repealed, but the preamble setting out the list of charitable trusts is kept alive by section 13 (2) of the Mortmain and Charitable Uses Act 1888.

[2] See *Re Geck, Freund* v. *Stewart*, 69 L. T., 819, where it was held that a legacy in trust to pay the income for ever to the deserving poor of a parish in a foreign country was good.

[3] 2 Prideaux's Convyg., 500; Tudor's Charitable Trusts, Chap. 1.

[4] *Re Foveaux, Cross* v. *London Anti-vivisection Society* (1895), 2 Ch., 501; 64 L. J., Ch., 856; 73 L. T., 202.

[5] *Re Nottage, Jones* v. *Palmer* (1895), 2 Ch., 649; 64 L. J., Ch., 695; 73 L. T., 629.

really nothing charitable in its nature, and it is void as being contrary to public policy, *e.g.*, a trust for saying masses, or requiems, for the souls of the dead[1]; and a legacy of this character by a testator domiciled in England is void, although the legatees are resident in a country where such a legacy would be valid.[2] And though a gift for the purpose of keeping up a tomb, or building, which is of no public benefit, is not superstitious, neither is it a charitable trust, and it is therefore void as a perpetuity,[3] unless expressly confined to the period allowed by law.[4]

Parker v. *Lethbridge.*

Thus, in a recent case, a testator directed a monument to John Locke to be erected on certain lands of his, and a certain portion of the rents of the lands to be perpetually applied in keeping in order, and taking care of, such monument; and it was held that the direction to so apply a portion of the rents was void.[5] But a trust to repair a church, or a monument in a church, being an ornament of the building, is a good charitable trust.[6] In one case[7]

Re Vaughan.

a testator bequeathed £500 in trust to apply such part of the income thereof as might be necessary in keeping in repair a family vault, and the residue in keeping in repair his brother's tomb in the parish churchyard, and also the churchyard itself. It was held that the gift, in so far as it related to keeping in repair the family vault and the brother's tomb, was not charitable and was void as a perpetuity, but

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[1] *West* v. *Shuttleworth*, 2 My. & K., 684.

[2] *Re Elliott*, *Elliott* v. *Johnson*, 39 W. R., 297.

[3] *Thompson* v. *Shakespeare*, 1 D. F. & J., 399; *Lloyd* v. *Lloyd*, Sim., N. S., 255.

[4] *Pirbright* v. *Salway*, *Weekly Notes* (1896), 86. A trust to repair a tomb in a churchyard until the end of 21 years after the death of the survivor of all persons living at testator's death was held void for uncertainty, as the Court could have no means of ascertaining when it would cease, *Re Moore*, *Prior* v. *Moore* (1901), 1 Ch., 936; 70 L. J., Ch., 358; 84 L. T., 501.

[5] *Re Jones*, *Parker* v. *Lethbridge*, 79 L. T., 154.

[6] *Hoare* v. *Osborne*, L. R., 1 Eq., 585; 35 L. J., Ch., 345.

[7] *Re Vaughan*, *Vaughan* v. *Thomas*, 33 Ch. D., 187; 55 L. T., 547.

that so far as it related to keeping the churchyard in repair it was charitable and good, the perpetuity rule not applying to charitable trusts. And where a testator bequeathed a large sum of Russian Stock to the London Missionary Society, with a proviso that if the Society should ever permit his tomb in Highgate Cemetery to fall into disrepair the Stock should then go to the Blue Coat School, the Court of Appeal held that the gift over from one charity to another was not subject to the perpetuity rule, and was valid.[1] But if the gift over had been to a private person, it would have been void under the perpetuity rule.[2] *Re Tyler.*

Where a testatrix devised a house to trustees in fee simple, upon trust to block up certain parts of it for twenty years, and subject thereto in trust for A in fee simple, it was held—apparently on the principle of its being in the nature of a superstitious trust—that the trust for blocking up part of the house was void, and that that portion of the house was undisposed of by the will for the term of twenty years from the testatrix's death.[3] It does not, however, necessarily follow that every trust not in favour of a human object is void. Thus, in one case a testator devised his real estate in strict settlement, and gave to his trustees certain horses and hounds, and charged his real estate with the payment to his trustees for the term of fifty years, if any of the animals should so long live, of an annual sum to be applied in the maintenance of such animals and the stables and kennels inhabited by them. It was held that *Brown* v. *Burdett.*

Trust for animals.

Re Dean, Cooper-Dean v. *Stevens.*

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[1] *Re Tyler, Tyler* v. *Tyler* (1891), 3 Ch., 252; 60 L. J., Ch., 686; 65 L. T., 367.

[2] *Re Bowen, Lloyd Phillips* v. *Davies* (1893), 2 Ch., 491; 62 L. J., Ch., 681; 61 L. T., 789. A gift of the income of personalty to a charitable purpose, with a condition that it shall revert to the donor on breach of condition—*e.g.*, to pay the vicar of a church so long as all the seats are free—was held to be valid (*Re Randell*, 38 Ch. D., 213; 57 L. J., Ch., 899; *Re Blunt's Trusts, Wigan* v. *Clinch* (1904), 2 Ch., 767; 74 L. J., Ch., 33).

[3] *Brown* v. *Burdett*, 21 Ch. D., 667; 52 L. J., Ch., 52; 47 L. T., 94.

this was not a charitable trust, or a superstitious trust, but was a valid private trust, although there might be no person who could enforce it.[1]

Favour shown to charities.

The Court always regards charitable trusts with special favour, and we have already pointed out that the rule against perpetuities does not apply to them. Another point that should be noticed is what is known as the *cy-près* doctrine, whereby, if a person expresses a general intention with regard to his property, and also directs a particular mode of carrying out the same, which is contrary to law or for some reason cannot be given effect to, the Court will carry out the intention as nearly as possible, rather than let the gift fail altogether. The Court applies this doctrine to charitable gifts, in that if a testator has created a particular charitable trust which fails, but has nevertheless shown a general charitable intention, the idea of the trust will be carried out as nearly as possible, and will not be allowed to fail, as would be the case were it a private trust. Thus, where a testator left pure personalty in trust to establish a soup kitchen and cottage hospital for the parish of Shoreditch, in such manner as not to violate the Mortmain Acts, and it turned out that it was impossible to apply the legacy in accordance with these directions, the Court of Appeal held that the will showed a general charitable intention to benefit the poor of the parish of Shoreditch, and that, although the particular purpose of the bequest had failed, the Court would execute the trust *cy-près*, and a scheme was directed accordingly.[2] Cases like this must, however, be carefully distinguished from cases of lapse, in which the doctrine is not applied,

Cy-près doctrine.

Biscoe v. *Jackson.*

Re Rymer.

[1] *Re Dean, Cooper-Dean* v. *Stevens*, 41 Ch. D., 552; 60 L. T., 813.

[2] *Biscoe* v. *Jackson*, 35 Ch. D., 460; 56 L. J., Ch., 540; 56 L. T., 753. See also *Re Davis, Hannen* v. *Hillyer* (1902), 1 Ch., 876; 71 L. J., Ch., 459; 86 L. T., 232.

for where a legacy is given to a charity which exists at the date of the will, but ceases to exist before the death of the testator, the legacy fails, in the same way that a legacy to an individual fails if he dies before the testator.[1]

Alteration of circumstances by lapse of time.

The *cy-près* doctrine is also applied to charitable gifts when, from lapse of time, and other circumstances, it is no longer right to carry out the intention of the donor in the exact mode which he has directed. The Court so acts upon the principle that, the circumstances having altered, a rigid adherence to the words would altogether defeat the principal object which the testator had in view, as distinguished from the means by which he wished the object carried out; and it is because a charitable trust may be perpetual that it is often necessary to revise its terms from time to time.[2]

Re Campden Charities.

Surplus income.

Another point of favour shown as regards charitable trusts is that if income is given for a purpose which does not entirely exhaust that income, yet the trust being for a charity, the whole income will be applied to augment the charity, though were the trust for the benefit of a private individual there would be a resulting trust of the surplus income. Thus, where a testator gave the residue of his personal estate to trustees upon trust to pay £12 a year for a certain purpose, and to apply any surplus income in clothing and putting out as apprentices to any trade or business two children of one parish and one of another, it was held that the residue, being more than adequate to the number of the objects of the charity, the surplus was applicable to similar purposes.[3]

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[1] *Re Rymer, Rymer* v. *Stansfield* (1895), 1 Ch., 19; 64 L. J., Ch., 86.
[2] *Re Campden Charities*, 18 Ch. D., 310; Brett's Eq. Cas., 42.
[3] *Attorney General* v. *Earl of Winchelsea*, 3 Bro. C. C., 373.

Gifts partly charitable and partly not.

It is evident, therefore, that it is very important to ascertain whether a particular gift is, or is not, charitable. Where, in a testamentary bequest, charitable purposes are mixed up with other purposes of so indefinite a nature that the Court cannot execute them, or where the description includes purposes which may, or may not, be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty.[1] No charitable trust is created by a legacy to be distributed in private charity,[2] or to objects of benevolence and liberality,[3] or for charitable or other purposes,[4] or for charitable or benevolent purposes,[5] or for charitable or philanthropic purposes[6]; or for acts of hospitality or charity[7]; but a legacy to charitable and benevolent institutions,[8] or for religious purposes,[9] does create a charitable trust.

The Charity Commissioners.

The Court of Chancery had an inherent jurisdiction with regard to charities, and such jurisdiction is now one of the matters specially assigned to the Chancery Division by the Judicature Act 1873; but it must be borne in mind that the Acts relating to Charitable Trusts, 1853-1894, have now relieved the Chancery Division of a part of the duties incident to this jurisdiction, various powers being conferred thereby on the Charity Commissioners, who may inquire into details, settle schemes, appoint and remove trustees, and do many other acts, subject to an appeal to the

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[1] *Hunter* v. *Attorney General* (1899), A. C., 309; 68 L. J., Ch., 449; 80 L. T., 732.
[2] *Ommaney* v. *Butcher*, T. & R., 260.
[3] *Morice* v. *Durham*, 9 Ves., 399; 10 Ves., 522.
[4] *Ellis* v. *Selby*, 1 My. & C., 286.
[5] *Re Jarman, Leavers* v. *Clayton*, 8 Ch. D., 584; 47 L. J., Ch., 675.
[6] *Re Macduff* (1896), 2 Ch., 451; 65 L. J., Ch., 700; 74 L. T., 706.
[7] *Re Hewitt, Mayor of Gateshead* v. *Hudspeth*, 53 L. J., Ch., 132.
[8] *Re Best, Jarvis* v. *Birmingham Corporation* (1904), 2 Ch., 354; 73 L. J., Ch., 808.
[9] *White* v. *White* (1893), 2 Ch., 41; 62 L. J., Ch., 342; *Arnott* v. *Arnott* (1906), 1 Irish R., 127. *Grimond* v. *Grimond* (1905), A. C., 124; 74 L. J., P. C., 35; 92 L. T., 477, is a decision upon Scotch law, and does not affect English and Irish cases.

Court. The discretion of the Charity Commissioners is generally subject to review by the Court, though the Court will not interfere with a scheme settled by them unless they have exceeded their jurisdiction, or the scheme contains something wrong in principle or in law.[1]

Position under 27 Eliz., c. 4.

It has been pointed out[2] that a voluntary trust of land was, under 27 Eliz., c. 4, void against a subsequent purchaser for value, but that this is not so now by reason of the Voluntary Conveyances Act 1893. But even before this Act it was held that a voluntary settlement in favour of a charity was not to be treated as within the meaning of 27 Eliz., c. 4, and was not avoided by a subsequent conveyance for value.[3]

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[1] *Re Campden Charities*, Brett's Eq. Cas., 42, and notes therein, p. 45.
[2] *Ante*, p. 42.
[3] *Ramsey* v. *Gilchrist* (1892), A. C., 412; 61 L. J., P. C., 72; 66 L. T., 806.

CHAPTER II.

OF TRUSTEES.

Trustees.

In the creation of express trusts, trustees are almost invariably named by the settlor; and where a power or trust is given to, or vested in, two or more trustees jointly, then, unless the contrary is expressed in any instrument creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.[1] In implied and constructive trusts, the person having the legal estate, or the possession of the property, is the person who naturally becomes the trustee. It is said that where a valid trust exists "Equity never wants a trustee," which means that where there is a trust capable of enforcement, the Court will follow the legal estate, and decree the person in whom it is vested to carry out and give effect to the trust.[2]

Equity never wants a trustee.

Appointment of new trustees.

Where trustees are appointed and they die, or cannot or will not act, or become incapable of acting, new trustees can be appointed, and this appointment may be effected in the following ways:—

(1) Under any express provisions contained in the instrument creating the trust, which may indicate the events on which they are to be appointed and the persons who are to appoint.

(2) Under section 10 of the Trustee Act 1893, by the person nominated for that purpose by the trust instrument, or if there is no such person, or none

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[1] Trustee Act 1893 (56 & 57 Vict., c. 53), sec. 22. This provision only applies to trusts constituted or created by instruments coming into operation after 31st December, 1881. But a surviving trustee could always have exercised the powers and duties of the original trustees, unless the trust instrument said otherwise, *Re Smith, Eastick* v. *Smith* (1904), 1 Ch., 139; 73 L. J., Ch., 74; 89 L. T., 604.

[2] Smith's Manual, 156.

able and willing to do it, by the surviving or continuing trustees, or the personal representatives of the last surviving or continuing trustee.[1] This appointment may be made: (1) when a trustee is dead; (2) when he remains out of the United Kingdom for more than 12 months[2]; (3) when he desires to be discharged; (4) when he refuses to act; (5) where he is unfit to act; or (6) when he is incapable of acting. On any appointment the number of trustees may be increased, and separate sets of trustees may be appointed for distinct parts of the trust property held on distinct trusts. It is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two were originally appointed; but, except where only one trustee was originally appointed, a trustee is not to be discharged from further obligations unless there will be at least two trustees to perform the trust. The provision relative to appointment in place of a deceased trustee includes the case of a person nominated trustee in a will but dying before the testator. Thus, if X and Y are appointed trustees and X predeceases the testator, Y can, after testator's death, appoint a new trustee; but if both died before the testator, or there was but one trustee and he died before the testator, then the provision does not apply.[3] *Nicholson* v. *Field.*

(3) By a person appointed to do so by an order of the Lunacy Judge obtained on summons, when the person having power to appoint new trustees is either a lunatic or person of unsound mind.[4]

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[1] 56 & 57 Vict., c. 53, sec. 10. See this Act in Appendix, *post.*

[2] See *Re Walker*, *Summers* v. *Barrow* (1901), 1 Ch., 259; 70 L. J., Ch., 229; 49 W. R., 167.

[3] *Nicholson* v. *Field* (1893), 2 Ch., 511; 62 L. J., Ch., 1015; 69 L. T., 299.

[4] *Re Shortridge* (1895), 1 Ch., 278; 64 L. J., Ch., 191; 71 L. T., 799. Lunacy Act 1890, secs. 116, 120, 128, 129, 133, 142. The order may also vest in the new trustees when appointed the right to call for a transfer of the trust property.

(4) By order of the Chancery Judge—or when the trustee is a lunatic or person of unsound mind, and is not an infant, of the Lunacy Judge[1]—if it is inexpedient, or difficult, or impracticable, to appoint without the assistance of the Court, or if a trustee is convicted of felony or is bankrupt.[2]

Who may be a trustee.

Nearly anyone is technically competent to be a trustee, but although an infant may be appointed he cannot properly act during his infancy, nor can a person of unsound mind. An alien may be a trustee, but if abroad he would not be subject to the Court's jurisdiction, and, therefore, should not be appointed. A bankrupt, though certainly not a satisfactory trustee, may yet be appointed, and can act. There is no technical objection to a woman being a trustee,[3] or even to a married woman, though it may often not be an expedient appointment by reason of the moral influence her husband may have over her, and the fact that, in some cases, it will be necessary for her husband to join in conveying the trust property.[4] A tenant for life, or remainderman, or solicitor to the trust, should not be appointed. The donee of the power to appoint new trustees, under section 10 of the Trustee Act 1893, must appoint some person other than himself.[5] Corporations can be, and often are, trustees.[6] When the Court is asked to appoint a trustee, the Court will consider not merely whether the person proposed is capable of being a trustee, but whether the appointment is advisable, and the

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[1] Lunacy Act 1890, secs. 135-143; *Re M.* (1899), 1 Ch., 79; 68 L. J., Ch., 86; 79 L. T., 459.

[2] Trustee Act 1893, sec. 25. See as to the practice, Indermaur's Manual of Practice, 326, 327.

[3] *Re Dickinson*, W. N., 1902, p. 104.

[4] *Re Harkness & Allsopp* (1896), 2 Ch., 358; 65 L. J., Ch., 726; 74 L. T., 652. See Indermaur & Thwaites' Conveyancing, 65, 66.

[5] *Sampson* v. *Sampson* (1906), 1 Ch., 435; 75 L. J., Ch., 302.

[6] *Thompson* v. *Alexander* (1905), 1 Ch., 229; 74 L. J., Ch., 133; 91 L. T., 835.

Court will not usually appoint a *cestui que trust*, or solicitor to a *cestui que trust*, to act as a trustee.[1] The Judicial Trustees Act 1896[2] now provides that the Court may, on application of a settlor or trustee or beneficiary, appoint a judicial trustee either jointly with another trustee or alone, or, on sufficient cause shown, in place of all or any existing trustees. The judicial trustee may be an official of the Court, and is always to be subject to the supervision of the Court as an officer thereof, and may be remunerated. If not an official of the Court, he must give security to perform his duties faithfully. In all cases, his accounts must be officially audited once a year. The appointment of a judicial trustee is a matter entirely in the Court's discretion,[3] and, unless there are special circumstances, the Court does not seem to be much in favour of making such an appointment.

Judicial Trustees Act 1896.

Naturally trustees' powers and duties depend to a certain extent on the provisions of the trust instrument, but, apart from that, there are many well known provisions and rules, and to these our attention must mainly be directed. When a trustee is first appointed he may disclaim the office, and such disclaimer may be by deed, or (except in the case of a married woman, who must disclaim by deed) by conduct tantamount to a disclaimer, and any disclaimer should be made within a reasonable period, having regard to the circumstances of the particular case.[4] If, however, the trustee does not disclaim, but accepts the trust, he must carry out its duties, and cannot retire except (1) by the special leave of the Court, or (2) by the consent of his *cestuis*

Trustees' powers and duties.

Disclaimer.

Retirement of trustees.

[1] See Brett's Eq. Cas., 168, and cases there quoted.
[2] 59 & 60 Vict., c. 35, sec. 1. See this Act set out in Appendix.
[3] *Re Ratcliff* (1898), 2 Ch., 252; 67 L. J., Ch., 562; 78 L. T., 834; *Douglas* v. *Bolam* (1900), 2 Ch., 749; 70 L. J., Ch., 1; 83 L. T., 448.
[4] Underhill's Trusts, 145, 146.

que trustent (who, to consent, must all be *sui juris*), or (3) under the provisions of the Trustee Act 1893.[1] The enactments of this Statute, as to the appointment of a new trustee, have already been referred to; and it further provides that, where there are more than two trustees, if one by deed declares that he desires to be discharged, and if his co-trustees and such other person (if any) as is empowered to appoint new trustees consent, then he shall be deemed to have retired, and shall by the deed be discharged, without any new trustee being appointed in his place.

Devolution of trust estates.

With regard to the devolution of trust property on the death of a sole, or sole surviving, trustee, the former rule was that it would pass under his will, either by virtue of an express devise, or even under a general devise without express reference to trust property, unless a contrary intention appeared in the will.[2] If there were no will, it would go to the trustee's heir, or personal representatives, according to the nature of the property. It was, however, provided by the Conveyancing Act 1881[3] that upon the death of a sole, or sole surviving, trustee, on or after 1st January, 1882, the trust property should go to the personal representatives of the trustee in all cases, and this notwithstanding any testamentary disposition. This provision, however, no longer applies to copyholds; by reason of the express provision to that effect laid down by the Copyhold Act 1887,[4] and now to be found in the Copyhold Act 1894,[5] and therefore as regards copy-

Provision of Conveyancing Act 1881.

Provision of Copyhold Acts 1887 and 1894.

[1] Sec. 11. This provision applies to trusts created either before or after the commencement of the Act.

[2] *Lord Braybroke* v. *Inskip*, Tudor's Lead. C. Convyg., 986.

[3] 44 & 45 Vict., c. 41, sec. 30.

[4] 50 & 51 Vict., c. 73, sec. 45.

[5] 57 & 58 Vict., c. 46. This merely repeats the previous provision in the Copyhold Act 1887. See also as to Mortgages, *post*, p. 199, 200.

hold trust property that passes to the devisee under the trustee's will, or if there is no will, it devolves on his customary heir. The effect of these provisions in the Copyhold Acts 1887 and 1894 has been to entirely repeal the previous provision of the Conveyancing Act 1881 as regards copyholds, so that if a sole trustee of copyholds died between the commencement of the Conveyancing Act 1881 (1st January, 1882) and the passing of the Copyhold Act 1887 (16th September, 1887), the legal estate in the copyholds, which, by the Conveyancing Act 1881, had on his death devolved on his personal representatives, was, on the passing of the Copyhold Act 1887, divested from them and vested in his devisee or customary heir. But the validity of any disposition of the property made by the personal representatives before the passing of the Copyhold Act 1887 is not affected by that Act.[1]

Trustees' power to give receipts.

A trustee has now full power to give proper receipts for all trust moneys and property of every description.[2] This was not so originally in all cases. The former rule on the subject, laid down in *Elliott* v. *Merryman*,[3] was, that where the property was vested in trustees in trust to sell for payment of debts generally, the trustees' receipts were good discharges, but not when the trust was to raise money for payment of specific amounts, for here any purchaser from the trustees was bound to see to the application of the money. But the Law of Property Act 1859[4] made the receipts of trustees in all cases sufficient for any purchase or mortgage money; and this was extended to all moneys by Lord Cranworth's Act.[5] And the present rule now stands, as already

Elliott v. *Merryman.*

[1] *Re Mills' Trusts*, 37 Ch. D., 312; 57 L. J., Ch., 466.
[2] 56 & 57 Vict., c. 53, sec. 20.
[3] 2 Wh. & Tu., 896.
[4] 22 & 23 Vict., c. 35, sec. 23.
[5] 23 & 24 Vict., c. 145, sec. 29.

stated, by force of the Trustee Act 1893—which replaced a similar provision in the Conveyancing Act 1881[1]—and applies to all trusts created either before or after the commencement of the Act. The Trustee Act 1893[2] also empowers—but subject to any contrary intention in the trust instrument—two or more trustees acting together, or a sole acting trustee when authorised to act by himself, to accept a composition or take security for or allow time for payment of any debt; and to compromise, compound, abandon, submit to arbitration, or otherwise settle any matter relating to the trust. The like power is given to an executor or administrator; and the provision applies to trusts created either before or after the commencement of the Act. It may here be noticed that under the Land Transfer Act 1897, the personal representative of a person dying on or after 1st January, 1898, is, notwithstanding any testamentary disposition to the contrary, made a trustee of the deceased's real estate other than copyholds; but if there are several personal representatives, one alone cannot sell without the authority of the Court.[3]

Trustees compromising, &c.

Land Transfer Act 1897.

General duties of a trustee.

The primary duties of a trustee are to make himself acquainted with the terms of the trust instrument, and to carry out those terms so far as he lawfully can; to take possession of the trust property, and take care of it, and invest it properly, and see that capital and income are both paid to those rightfully entitled; and to act fairly between all the beneficiaries. Incidentally, he must be ready to furnish information to the beneficiaries as regards

[1] 44 & 45 Vict., c. 41, sec. 36.

[2] Sec. 21, in place of former provision in Conveyancing Act 1881, sec. 37.

[3] 60 & 61 Vict., c. 65, secs. 1, 2. See hereon, *Re Pawley & London & Provincial Bank* (1900), 1 Ch., 58; 69 L. J., Ch., 6; 81 L. T., 507; *Re Cohen* (1902), 1 Ch., 187; 71 L. J., Ch., 568; 86 L. T., 73.

the trust property and its investments, keep accurate accounts of the trust property, make no profit for himself, and refrain from delegating his duties and from buying from his co-trustees.

Conversion of property by trustees.

There may be certain cases in which it is the duty of trustees to convert the trust property. If trustees are directed to invest certain moneys in the purchase of land, or to sell certain land, and in either case to stand possessed of the property produced by the conversion for a *cestui que trust*, it is manifestly their duty to carry out these directions as soon as they conveniently can. It must be observed, however, that even before they do so the nature of the property is deemed to be changed by reason of the maxim "Equity looks on that as done which ought to be done." This is styled the doctrine of Conversion, a matter which is dealt with hereafter.[1]

Wasting and reversionary property.

Howe v. *Earl of Dartmouth*.

But it may be the duty of a trustee to convert property even though there is no direction to that effect. Thus, in *Howe* v. *Earl of Dartmouth*,[2] the rule was laid down that where personal property, being either of a wasting nature or of a kind not yielding a present income, is by will[3] given in trust *as a whole, and not specifically*, for one for life with remainders over, it is to be converted and properly invested, so that thus, for instance, short leaseholds may be preserved for the remainderman, and the tenant for life may gain a benefit from reversionary property. This rule, however, only applies where property is given as a whole, and not specifically, for, when either wasting or reversionary property is given to persons specifically in the strict sense of the word, then there can be no reason for converting it,

When rule not acted on

[1] *Post*, Part III., Chap. 3.
[2] 1 Wh. & Tu., 68.
[3] The rule only applies to dispositions by will, *Re Van Straubenzee*, *Boustead* v. *Cooper* (1901), 2 Ch., 779; 70 L. J., Ch., 825.

for there is evidently no intention that it should be converted—the parties must take their chances as to their benefits. And the rule is, of course, not to be applied if in the instrument there is found a sufficient indication of intention to exclude it. Thus an express direction for sale at a particular period, indicates an intention that there should not be any previous sale or conversion, so that an express trust to convert at the death of the tenant for life will entitle the tenant for life to specific enjoyment.[1]

Examples of rule not being applied.

Gray v. *Siggers.*

And where a testator's property consisted of short leaseholds, and was given to trustees in trust to pay the income to his wife for life, and then to his grandchildren, and the testator gave his trustees power to retain any portion of his property in the same state in which it should be at his decease, or to sell and convert the same as they should in their absolute discretion think fit, the Court held that the special power to retain existing investments took the case out of the general rule as to the conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds for such period as they thought fit.[2] Instances of an intention that the rule in *Howe* v. *Earl of Dartmouth* shall not apply might be multiplied, but it would only tend to confusion, and it may safely be stated that it is in many cases by no means an easy point to determine whether the rule does or does not apply.[3] However, it has been laid down that the rule is to be applied unless upon the fair construction of the will there is a sufficient indication of intention against it, and the burden of proof in every case rests upon the person who says it is not to be applied.[4]

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[1] *Alcock* v. *Sloper*, 2 My. & C., 699.

[2] *Gray* v. *Siggers*, 15 Ch. D., 74; 49 L. J., Ch., 819.

[3] See numerous cases quoted and dealt with, 1 Wh. & Tu., 79-86. See also *Re Game*, *Game* v. *Young* (1897), 1 Ch., 881; 76 L. T., 450; 45 W. R., 472.

[4] *Macdonald* v. *Irvine*, 8 Ch. D., 101; Brett's Eq. Cas., 154, and Notes.

Right of tenant for life before conversion of wasting property.

Where property is given specifically, or there is an indication of the testator's intention that the rule in *Howe* v. *Earl of Dartmouth* is not to apply, the tenant for life is entitled to the actual income the property produces. But if testator gives the whole, or the residue, of his personal estate in trust for one for life and then over, and any part of the property is of a wasting nature or consists of securities which are not authorised as a trustee investment, and the testator does not expressly direct them to be retained, then—even though the will gives the trustees power to postpone conversion as long as they think fit, but contains no gift of the actual income therefrom pending conversion—the tenant for life is only entitled in the shape of income on that part of the property to 3 per cent. per annum on its value, estimated at the date of the death, if the will directed immediate conversion, or if the will is silent at the end of a year after the death; and all surplus income on that part of the estate must be invested as capital, and the income from such investment paid also to the tenant for life.[1] If the tenant for life receives the whole income of unauthorised investments which are retained, he is liable to refund the excess[2]; and if he receives the whole income of short leaseholds or terminable annuities until they expire, he is liable to recoup their capital value if they had been sold at the proper time.[3] The case of *Brown* v. *Gellatly*[4] is a good example, and the facts may be usefully referred to. The testator was a shipowner and merchant, and gave his executors and trustees power to realize his estate, when and in such a manner as they should

Brown v. *Gellatly.*

[1] *Re Chaytor, Chaytor* v. *Horn* (1905), 1 Ch., 233; 74 L. J., Ch., 106; 92 L. T., 290; *Re Woods, Gabellini* v. *Woods* (1904), 2 Ch., 4; 73 L. J., Ch., 204; 90 L. T., 8; *Rowlls* v. *Bebb* (1900), 2 Ch., 107; 69 L. J., Ch., 562; 82 L. T., 633; *Re Lynch-Blosse, Richards* v. *Lynch-Blosse*, W. N., 1899, p. 27; *Meyer* v. *Simonson*, 21 L. J., Ch., 678; 5 De G. & Sm., 723.

[2] *Hood* v. *Clapham*, 19 Beav., 90.

[3] *Tickner* v. *Old*, 18 Eq., 422; 31 L. T., 29.

[4] L. R., 2 Ch. App., 751.

think fit, and to sail his ships for the benefit of his estate until they could be satisfactorily sold, and he gave the residue of his estate to tenants for life, with remainders over, and specified certain securities in which the money might be invested. The trustees sailed the ships and earned large profits, but as to these profits the Court held that the sailing was not particularly for the benefit of the tenants for life, or the remaindermen, but for the benefit of the estate generally, and that a value must be set upon the ships as at the death of the testator, and that the tenant for life was entitled to interest at the proper trustee rate (then 4 per cent., but now 3 per cent.) on such value, and that the residue must be invested as part of the capital.

Reversions, &c.

In cases such as *Brown* v. *Gellatly*, in which the actual income received is more than 3 per cent., the remainderman is the gainer; but the same principle applies for the benefit of the tenant for life where the property is bringing in no income, and is not presently saleable, or realizable, except at an unreasonable loss, *e.g.*, a policy of insurance on a person's life, or a reversion which it is not considered advisable to sell. In such cases the rule is applied in the following way: The amount that is ultimately obtained (*e.g.*, in the case of reversionary interests by their falling into possession) will be apportioned by ascertaining the sum which, put out at interest at 3 per cent. per annum on the day of the testator's death, and accumulated at compound interest calculated at that rate, with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced the amount actually received; and the sum so ascertained must be treated as capital, and the difference between that sum and the sum received, as income.[1] The

[1] *Re Chesterfield*, 24 Ch. D., 643; 52 L. J., Ch., 958; 49 L. T., 261; *Re Hobson, Walker* v. *Appach*, 55 L. J., Ch., 422; 53 L. T., 627; *Re Goodenough* (1895), 2 Ch., 537; 65 L. J., Ch., 71; 73 L. T., 152; *Re Morley* (1895), 2 Ch., 738; 64 L. J., Ch., 727; 73 L. T., 151.

same principle applies where a debt due to the estate is recovered by the trustees without interest.[1]

Insufficient mortgage securities.

With regard to mortgages held by a testator, and which on his death become vested in his trustees, if they come in under a general gift to one for life and then over, and they are authorised securities, the tenant for life is entitled to all the income actually received. And if the mortgage on realization proves a deficient security, the money received on realization (*e.g.*, on sale) is to be divided between capital and income in the proportion which the principal money due bears to the actual arrears of interest at the date of realization.[2] In contradistinction to this, if a trustee is guilty of a breach of trust which causes a loss of capital—*e.g.*, by selling out consols and investing the proceeds in a mortgage over his own property, which proves deficient on realization—the innocent tenant for life cannot claim to participate in the sale moneys for arrears of interest, unless he is willing to bring into account all the back income he has received from the security.[3]

Duties of trustees in selling property.

Whenever trustees sell the trust property they must take care to sell it properly, and generally to use their utmost endeavours to dispose of it to the best advantage. They should select the best place and best time for selling, and the best person to sell, taking indeed every reasonable precaution, and acting as prudent men would in the management of their own affairs. They should sell under proper conditions of sale, and not on an open contract, for to do that might be to burden their trust estate with costs

[1] *Re Duke of Cleveland's Est.*, *Hay* v. *Woolmer* (1895), 2 Ch., 542; 65 L. J., Ch., 29; 73 L. T., 313.

[2] *Re Atkinson*, *Barber's Co.* v. *Grose-Smith* (1904), 2 Ch., 160; 73 L. J., Ch., 585; 90 L. T., 825.

[3] *Re Bird*, ~~Bird~~ Rodd v. *Evans* (1901), 1 Ch., 916; 70 L. J., Ch., 514; 84 L. T., 294.

Depreciatory conditions.

which ought not to be thrown upon it; but, at the same time, the conditions must not be too strict, for if they are unnecessarily so, they may frighten away intending purchasers and seriously injure the sale. The trustees must steer a prudent middle course, and, in so far as they do not, may be liable for a breach of trust. It was formerly held that where trustees sold under unnecessarily depreciatory conditions, no purchaser could be compelled to complete his purchase, or could in fact safely complete, for he would be taking with notice of a breach of trust.[1] But it is now provided[2] that a *cestui que trust* shall not be able to impeach a sale by his trustee, on the ground that any condition of sale was unnecessarily depreciatory, unless the consideration for the sale was thereby rendered inadequate. It is also provided[2] that, after execution of the conveyance, no sale by a trustee shall be impeached against the purchaser on the ground of any condition of sale being unnecessarily depreciatory, unless such purchaser was acting in collusion with the trustee when the contract for sale was made. And no purchaser on any sale by a trustee can now object to the title, upon the ground of the conditions having been depreciatory.[2] The effect of these provisions is, that a trustee will still be liable for any actual loss caused by improper conditions, and that in such event, before completion, the sale can be set aside; but that after completion the purchaser is safe in his purchase, if he has not colluded with the trustee, and in no event can the purchaser object to the sale having been made under depreciatory conditions.

Provision of Trustee Act 1893, as to depreciatory conditions.

Effect of provision of the Trustee Act 1893.

Trustees' duties as regards investments.

Trustees must take great care that the trust property is properly and satisfactorily invested, and

[1] *Dunn* v. *Flood*, 28 Ch. D., 586; 54 L. J., Ch., 370.

[2] Trustee Act 1893, sec. 14, in substitution for the repealed section 3 of the Trustee Act 1888 (51 & 52 Vict., c. 59). This applies to all sales made after 24th December, 1888.

if it is not, they should at once convert it, and effect a proper and satisfactory investment unless, indeed, the investments are specially allowed by the trust instrument to be retained. But trustees are not bound to sacrifice property by an immediate sale where there appears to be a prospect of improvement if they wait, for they are entitled to exercise a reasonable discretion. There is no rule that trustees commit a breach of trust if they retain authorised securities in a falling market, when they honestly believe that that is the best course for all parties; the question is, what was best to be done at the time, and they must show that they had reasonable grounds for their conduct.[1] And the Trustee Act 1894 now enacts that a trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law.[2]

Trustees' duties as regards muniments of title, &c.

Trustees also must keep the muniments of title, and all securities representing the trust fund, under their own control, and so that they cannot be got at without the consent of all of them, as, for instance, by depositing them at a bank, or in a safe to which access can only be obtained by them collectively. However, circumstances may render a departure from this strict course of procedure not unreasonable, so that where trustees had invested on mortgage of a freehold building estate in course of development, which necessitated frequent reference to the deeds by the trustees or their solicitors, it was held that it was not improper, or unreasonable, to allow the deeds to remain in the possession of their solicitor.[3]

[1] *Re Chapman, Cocks* v. *Chapman* (1896), 2 Ch., 763; 65 L. J., Ch., 892; 75 L. T., 196.

[2] 57 Vict., c. 10, sec. 4.

[3] *Field* v. *Field* (1894), 1 Ch., 425; 63 L. J., Ch., 233; 69 L. T., 826.

Trustees' statutory powers of investment.

The subject of trustees' investments is dealt with by sections 1 to 6 of the Trustee Act 1893,[1] as amended by section 2 of the Colonial Stock Act 1900.[2] The 1893 Act summarizes the whole matter, and applies to trusts created before as well as to those created since its passing, and is in addition to any powers that may be conferred by the trust instrument.[3] The Trustee Act 1893 is set out in the Appendix at the end of this work, and the student is specially referred to the details of what investments trustees may make unless expressly forbidden by the trust instrument. The following are some of the chief investments which this statute allows:—Parliamentary stocks or public funds or Government securities of the United Kingdom; real securities in Great Britain or Ireland; stock of the Bank of England or Ireland; India stock; any securities the interest of which is guaranteed by Parliament; Metropolitan Board of Works or London County Council stock; debentures or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend of not less than 3 per cent. on its ordinary stock; certain canal and water companies' stock; certain stock of Indian railway companies; stock issued by the corporation of any municipal borough having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order; any colonial stock registered in the United Kingdom

[1] 56 & 57 Vict., c. 53. This Act repealed similar provisions in 52 & 53 Vict., c. 32; prior to this the subject was governed by 22 & 23 Vict., c. 35, sec. 32; 30 & 31 Vict., c. 132; 34 & 35 Vict., c. 47.

[2] 63 & 64 Vict., c. 62.

[3] 56 & 57 Vict., c. 53, sec. 4.

under the Colonial Stock Acts 1877 to 1900, with respect to which the Treasury regulations have been complied with; and finally, any stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court. As to the investment of cash under the control of the Court, this is provided for by Order of Court,[1] the details of which are very similar to the other general investments under the Trustee Act 1893, and it would only tend to confusion to set it out here.

Investment of cash in Court.

It is enacted by the Trustee Act 1893,[2] that every power of investment conferred by the Act shall be exercised according to the discretion of the trustees, but subject to any consent required by the instrument (if any) creating the trust, with respect to the investment of the trust funds. It is also specially provided that trustees may invest in any of the securities specified in the Act notwithstanding the same may be redeemable, and that the price exceeds the redemption value; but that a trustee may not purchase at a price exceeding its redemption value any stock of a railway or water company, or municipal corporation or county council, if it is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase the same, if it is liable to be redeemed at par or at some other fixed rate, at a price exceeding 15 per cent. above par or such other fixed rate. A trustee is also allowed to retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of the Act.[3]

Discretion in investments.

Purchase at a premium of redeemable stocks.

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[1] Order XXII., rule 17. See Indermaur's Manual of Practice, 284, 285.

[2] 56 & 57 Vict., c. 53, sec. 3.

[3] Sec. 2.

Investment of capital money under the Settled Land Act 1882.

Capital money under the Settled Land Acts[1] may be invested on all securities on which trustees may invest trust funds, and all securities authorised by the settlement, and also on the following exceptional securities, viz.: debentures and debenture stock of any railway company in Great Britain or Ireland incorporated by Act of Parliament and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares; the discharge of any incumbrance on the settled land; the payment for any improvements authorised by the Act; the purchase of the seignory or reversion of the settled estate; and the purchase of fee simple lands, or copyholds, or leaseholds having at least sixty years unexpired, or minerals.

Special powers of investment.

The scope of investments for trustees is now therefore a fairly wide one, but, in addition, the trust instrument itself frequently prescribes the investments the trustees may make, and then, if acting *bonâ fide*, they are safe if they invest in accordance with it. The power to invest on real securities means a first[2] legal[3] mortgage of the fee simple in freeholds or copyholds, and not of leaseholds.[4] But unless the trust instrument expressly forbids it, it now includes also a mortgage of leaseholds held for an unexpired term of not less than 200 years, and not subject to a reservation of rent greater than 1s. a year, or to any right of redemption, or to any condition of re-entry except for non-payment of rent; and it also includes any charge, or mortgage of any

Real security.

[1] 45 & 46 Vict., c. 38, sec. 21. See also 46 & 47 Vict., c. 61, sec. 29, and 57 & 58 Vict., c. 30, sec. 96. Generally as to investments under S. L. A. 1882, see notes to sec. 21 in Hood & Challis' Convyg. & Settled Land Acts.

[2] *Norris* v. *Wright*, 14 Beav., 308; *Swaffield* v. *Nelson*, W. N., 1876, p. 255; *Chapman* v. *Browne* (1902), 1 Ch., 785; 71 L. J., Ch., 465; 86 L. T., 744.

[3] *Swaffield* v. *Nelson*, *supra*; *Wyatt* v. *Sherratt*, 3 Beav., 498.

[4] *Re Channell*, 47 L. J., Ch., at pp. 587, 588, per Jessel, M.R., and James, L.J.

charge, made under the Improvement of Land Act 1864.[1] It is also provided that trustees having power to invest in the mortgages or bonds of any company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of the company.[1]

Trust funds must not be invested in the purchase of land, unless they are capital moneys under the Settled Land Acts or unless the trust instrument expressly so authorises. But when trust funds have been improperly so invested, the trustees can make a perfectly good title to a purchaser with notice of the breach of trust, unless *all* the beneficiaries are *sui juris* and elect to take the land.[2]

Exercise by trustees of discretion as to investments.

Trustees must, in the exercise of any discretion with regard to investments, act reasonably and prudently, so that if they have a discretion to invest in certain specific investments, comprising good and bad securities, and they choose a bad security, then they will be liable, upon the ground that a prudent man would not have invested his own money in such a security. They cannot safely invest on second mortgage, but as regards property subject to a drainage or other rent charge under the Public Money Drainage Acts 1846 to 1856, or the Improvement of Land Act 1864, they may invest on that, notwithstanding such charge, unless the trust instrument expressly forbid them.[3] Trustees are not justified in investing on personal security, unless it is expressly provided that they may do so, nor in anything of a manifestly, or probably, risky nature.[4] They are not indeed,

[1] 56 & 57 Vict., c. 53, sec. 5.

[2] *Power* v. *Banks* (1901), 2 Ch., 487; 70 L. J., Ch., 700; 85 L. T., 376; *Re Jenkins & Randall* (1903), 2 Ch., 362; 72 L. J., Ch., 693; 88 L. T., 608.

[3] 56 & 57 Vict., c. 53, sec. 6.

[4] *Potts* v. *Britton*, L. R., 11 Eq., 433; *Bethell* v. *Abraham*, L. R., 17 Eq., 24.

even in cases in which they have an absolute discretion given them, justified in doing just as they choose, and the opinion has been expressed that in such cases the discretion of the trustees is limited to a discretion as to which of the several forms of security authorised by law they shall invest in, and does not give them power to invest in securities not so authorised.[1] Although, however, no doubt it would be wisest for trustees to act on this view of the question, yet it would seem that a discretion of a perfectly general nature means more than this,[2] and probably the more correct rule is, that where trustees have an absolute discretion, then, if they exercise that discretion fairly and honestly, and make reasonable investments—though not strictly trustees' investments—they will not be held liable, but that if they act with imprudence, making rash and hazardous investments, then they will be liable.[3]

Necessity of trustees exercising discretion honestly.

But where trustees have a discretion they must take care to act with complete honesty in its exercise. If, however, there are two trustees, and one only is guilty of conduct which is not honest or right, and the other has in no way participated, but is entirely innocent, then he will not be liable. Thus in one case A and B were trustees with power to invest in such securities as they thought fit, and they invested £3,000 in certain debentures of a company. A was the person actively concerned in making the investment, and he received a commission of £300 in respect of the investment. B simply concurred in making the investment, and knew nothing of the commission paid to A. It was held that A was liable in respect of the investment, for he had not

Smith v. *Thompson.*

[1] See Underhill's Trusts, 226.

[2] *Re Smith*, *Smith* v. *Thompson* (1896), 1 Ch., 71; 65 L. J., Ch., 159; 73 L. T., 604.

[3] See *Re Brown*, *Brown* v. *Brown*, 29 Ch. D., 889; 54 L. J., Ch., 1134; 52 L. T., 853.

acted honestly, and that he must make good all loss accruing to the estate in respect of it, and also recoup the £300 he had received, but that B was under no liability.[1]

Former position as to investing on mortgage.

With regard to investments on mortgage, the strict rule was formerly that trustees should not advance more than two-thirds of the value of freehold land, or more than one-half of the value of freehold houses. But this was not a hard and fast rule, and was not enforceable with exact strictness, the true test of liability being really whether the trustees had acted as prudent men would have acted if dealing with their own property[2]; and if they had failed in prudence, and neglected any due precautions, then they might find themselves liable. Thus, where trustees employed a surveyor who was ignorant of the locality, they were held not to have acted prudently, and to be liable.[3] The Trustee Act 1893,[4] however, now enacts that a trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust, by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made—provided it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business where the property was

Provisions of Trustee Act 1893 as to mortgage investments.

[1] *Re Smith, Smith* v. *Thompson* (1896), 1 Ch., 71; 65 L. J., Ch., 159; 73 L. T., 604.

[2] *Re Godfrey, Godfrey* v. *Faulkner*, 23 Ch. D., 483; 52 L. J., Ch., 820; 48 L. T., 853.

[3] *Budge* v. *Gammow*, L. R., 7 Ch. Apps., 719; 41 L. J., Ch., 520.

[4] 56 & 57 Vict., c. 53, sec. 8, replacing sec. 4 of the Trustee Act 1888.

situate or elsewhere; and provided also that the loan did not exceed two-thirds of the value of the property as stated in such report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

What title a trustee may take.

A trustee must, in purchasing, or investing on mortgage, see that he gets a good title. Hereon the Trustee Act 1893 enacts, that no trustee lawfully lending money on leasehold property is to be chargeable with breach of trust only because he dispensed either wholly or partly with the production or investigation of the lessor's title; and further, that it is not to be deemed a breach of trust, in buying or lending money on property, to accept a shorter title than a purchaser or mortgagee is by law entitled to in the absence of a special contract, if the Court thinks that a person acting with prudence and caution would have accepted the same title. These provisions apply to the transfers of securities existing at the time of the passing of the Act, and to investments made as well before as after the Act, except where legal proceedings were pending with regard to any particular transaction on the 24th December 1888.[1]

Prudence must be always observed.

But this Act leaves untouched the general guiding principle that trustees must act with prudence, and has only laid down the rule that certain things shall not be deemed imprudent. It will be observed that, under the provision just referred to, two-thirds of the value of the property may now in all cases be advanced, whether such property consists of land or of houses, and that the surveyor, or valuer, need not necessarily be a local man. As to the report of the

The surveyor's report.

[1] 56 & 57 Vict., c. 53, sec. 8, being in substitution for section 4 of the Trustee Act 1888.

surveyor, or valuer, it must state the value of the property, and advise that an advance may be made, but it need not say how much should be advanced, for the Act itself deals with that point and says two-thirds. A trustee is not entitled to the protection afforded by the Trustee Act 1893 unless the report or valuation upon which he acted in making the investment was made upon his own instructions, and directed to the particular investment, so that he must not leave the selection of the surveyor to his solicitors, though, of course, they may introduce him to a surveyor, or advise him as to the selection. Thus, where trustees instructed their solicitors to find a thoroughly good mortgage security, and the solicitors had at the time in their hands a report of certain surveyors and valuers, which had been made for another client of theirs, with respect to a number of houses, including two on which the trustees, on the faith of the report, advanced the trust money, and there was a loss, they were held liable.[1]

Trustees must themselves select the surveyor.

Assume that trustees act strictly in accordance with the provisions of the Trustee Act 1893, yet they may be held liable, for there may be imprudence in other respects. Thus it has been laid down that trustees are practically never justified in investing on mortgage of property not at the time producing income, and, that if they do, it is at their own risk[2]; and where property has, through a business carried on there, some special value, trustees should act upon the value of the property apart from the circumstances which regulate its business value.[3] The Court of Appeal also, in *Re Whiteley*, *Whiteley* v.

How trustees may still be liable, notwithstanding the Trustee Act 1893.

[1] *Re Walker*, *Walker* v. *Walker*, 59 L. J., Ch., 386; 62 L. T., 449. See also *Fry* v. *Tapson*, 28 Ch. D., 268; 54 L. J., Ch., 224; 51 L. T., 326.

[2] *Hoey* v. *Green*, W. N., 1884, p. 236; see also *Smethurst* v. *Hastings*, 30 Ch. D., 490; 33 W. R., 496; 52 L. T., 567.

[3] *Partington* v. *Allen*, 57 L. T., 654.

Re Whiteley, Whiteley v. *Learoyd.*

Learoyd,[1] laid down several points in connection with the subject of trustees' mortgage investments in an extremely clear manner. The facts in that case were that trustees, having power to invest in real securities, in the year 1877 advanced £3,000 on mortgage of freehold brickworks, having, before lending the money, employed a valuer who estimated the property as a going concern to be a good security for more than the advance, the details of his valuation being—land worth £2,000, buildings £2,400, and plant £2,600. The mortgagor became a bankrupt, and the security proved insufficient, and the trustees were held liable for the deficiency. The Court laid down that a trustee's duties in making investments are: (1) To choose only those investments which come within the terms of his trust; (2) In selecting one of those investments, to use the care and caution which an ordinarily prudent man would exercise in the business of investing money for the benefit of persons entitled to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income; (3) To apply such care and caution in acting on advice which they have obtained on matters which they do not personally understand, *e.g.*, valuations, and that the mere fact that they have obtained such advice is not in itself sufficient.

Trustees' duties in making investments.

Trustees must not lend on a contributory mortgage.

As a further instance of what will be imprudence on a trustee's part, it has been held that trustees are never justified in advancing on a contributory mortgage, and that to do so is a breach of trust, no matter how good the security may be.[2] Thus, A and B are trustees and have £3,000 to invest. C has an admirable security for £5,000, and D is willing to join with A and B in the investment, they advancing

[1] 33 Ch. D., 347; 55 L. J., Ch., 864; 55 L. T., 564. Affirmed in House of Lords, *sub. nom. Learoyd* v. *Whiteley*, 12 App. Ca., 727; 57 L. J., Ch., 390; 58 L. T., 93.

[2] *Webb* v. *Jonas*, 39 Ch. D., 660; 57 L. J., Ch., 671; 58 L. T., 882.

their £3,000 trust money, and he advancing £2,000, and there being a joint mortgage to A, B, and D. A and B must not make this investment. Trustees also must not enter into any arrangement with a mortgagor for the continuance of the loan for a period of years, for they would thereby hamper themselves in the event of its being desirable to realize.[1]

Nor for a period of years.

When trustees advance on mortgage more than two-thirds of the value of the property, they are no doubt guilty of a breach of trust, and, in the event of there being a loss, the question arises as to the extent of their responsibility. Formerly, if they had advanced too much, they were liable for all loss that might occur, because they were originally wrongdoers. This is, however, not now the law, for the Trustee Act 1893[2] now provides, that where trustees advance an improper sum on a mortgage security, which would at the time of the advance be a proper investment for a smaller sum, the security shall be deemed an authorised security for the less sum which might at the time of investment have been properly advanced thereon, and they shall only be liable to make good the excess with interest. Thus, suppose the surveyor, employed by trustees, reports that the property is worth £1,500, and advises that an advance may be made. The trustees lend £1,200, whereas they ought only to have lent £1,000. The property afterwards goes down very much in value, and ultimately realizes only £900, so that there is a loss of £300; the trustees will only be liable to make good £200 of this deficiency, being the excess beyond what they ought to have advanced. A trustee

Extent of trustees' liability for advancing more than two-thirds.

Example of position now.

[1] *Vicary* v. *Evans*, 33 Beav., 376.

[2] 56 & 57 Vict., c. 53, sec. 9, being a similar enactment to the now repealed provision of the Trustee Act 1888, sec. 5. It is retrospective except as to actions pending on 24th December, 1888.

is not, however, entitled to the protection afforded by this provision unless the investment which has proved deficient was a proper investment at the time in all respects other than value.[1] When a trustee advances too much on a security, or advances on an improper security, he may always, if he desire, pay the whole amount, and take over the security. If the security was one the trustee had no power to invest on, it appears that the *cestuis que trustent* must either accept it or reject it, and cannot realize without notice to him, so as to give him the option of paying the money and taking over the investment; but there is no such rule if the investment is of a description authorised by the trust, and the breach of trust consists only of a want of care and caution.[2]

Trustee's liability for defaults of co-trustees.

Besides being liable for his own individual acts, a trustee may often find himself liable for the breaches and defaults of his co-trustee, the rule being that he is liable if he has in any way conduced to the breach of trust, *e.g.*, by permitting his co-trustee to receive and retain trust money, or handing over the trust money to him.[3] To this rule there is one prominent exception, and that is where the co-trustee resides at a distance, and money is remitted to him there, to be properly applied, where an agent would naturally be employed; for here, if he misapplies it, the other trustee is not liable.[4]

Joy v. *Campbell.*

Liability for acts of agents.

It is a general rule that trustees may not delegate their powers—for they themselves are but delegates,

[1] *Re Walker*, *Walker* v. *Walker*, 59 L. J., Ch., 386; 62 L. T., 449.
[2] *Re Salmon*, *Priest* v. *Uppleby*, 42 Ch. D., 351; 38 W. R., 150; 61 L. T., 146.
[3] *Townley* v. *Sherborne*, 2 Wh. & Tu., 629; *Robinson* v. *Harkin* (1896), 2 Ch., 415; 65 L. J., Ch., 773; 74 L. T., 777.
[4] *Joy* v. *Campbell*, 1 Sch. & L., 341.

and the maxim is *Delegatus non potest delegare*—yet they may do so where a moral necessity for it exists, or where it is done in the ordinary and proper way of business.[1] Thus, though it is the duty of trustees to keep the trust securities under their own control, and not to entrust them to others, yet this is subject to reasonable limits, so that it has been held that where deeds have to be frequently referred to, *e.g.*, for the purpose of realizing the trust estate, it is proper for them to be left in the custody of the trustees' solicitors.[2] And where trustees properly held certain American bonds transferable by delivery, with coupons attached, it was held that they might safely and properly deposit them with their bankers, so that they might from time to time cut off the coupons and collect the amounts.[3] The right to delegate in a proper case is, however, perhaps best shown by the important case of *Re Speight, Speight* v. *Gaunt*,[4] where it was necessary to purchase certain stock, and the trustee employed a stockbroker to purchase it, who falsely represented that he had done so, whereupon the amount was paid to and misapplied by him. It was held that the trustee was not liable, for he had acted *bonâ fide*, in the ordinary way of business, and with reasonable prudence, having selected a stockbroker of fair repute. In another case, it being necessary for trustees and executors to sell certain bonds in public companies which were registered in the testator's name, they handed them to a stockbroker for the purpose of getting them converted into unregistered bonds (a course which

Re De Pothonier.

Re Speight, Speight v. *Gaunt.*

Gasquoine v. *Gasquoine.*

[1] *Ex parte Belchier*, Amb., 218.

[2] *Field* v. *Field* (1894), 1 Ch., 425; 63 L. J., Ch., 233; 69 L. T., 826.

[3] *Re De Pothonier, Dent* v. *De Pothonier* (1900), 2 Ch., 529; 69 L. J., Ch., 773; 83 L. T., 220.

[4] 9 App. Ca., 1; 53 L. J., Ch., 419; Brett's Eq. Cas., 170. See also *Re Weall, Andrews* v. *Weall*, 42 Ch. D., 674; 58 L. J., Ch., 713; 61 L. T., 238.

was proved to be usual though not absolutely necessary), and then to sell. The broker sold the bonds and misappropriated the proceeds, and it was held that the trustees were not liable for the loss, their conduct having been reasonably necessary, and without negligence.[1] To successfully make out, however, that a trustee is not liable for the act of an agent he has employed, it must be shown that he has taken all ordinary precautions, and generally acted as a prudent man; so that where a trustee employed an outside stockbroker, who misapplied the trust money, the trustee was held not to have acted prudently, and to be liable for the loss.[2]

Robinson v. *Harkin.*

Trustees acting by solicitor.

Although it has been held that trustees are liable for the fraudulent act of their solicitor,[3] yet it would appear, on the foregoing principle, that if it is a proper employment, and nothing has been done but what is usual, the trustees will not be liable for money entrusted to the solicitor, *e.g.*, where trustees employ a solicitor to complete a mortgage, and just before completion hand him the necessary amount. Clearly, however, the trustees must be very careful as to the way in which they act, and they will certainly be liable if they allow a solicitor to receive and retain money pending an investment being found.[4] It is submitted also, that where trustees, on making an investment, instruct a solicitor to investigate the title—as is in fact their duty to do—and such solicitor is guilty of some error, and there is by reason thereof a loss, the trustees are not

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[1] *Re Gasquoine, Gasquoine* v. *Gasquoine* (1894), 1 Ch., 470; 63 L.J., Ch., 377; 70 L. T., 196.

[2] *Robinson* v. *Harkin* (1896), 2 Ch., 415; 65 L. J., Ch., 773; 74 L. T., 777.

[3] *Bostock* v. *Floyer*, L. R., 1 Eq., 26.

[4] See *Re Mitchell, Mitchell* v. *Mitchell*, 54 L. J., Ch., 342; 52 L. T., 178; *Wyman* v. *Paterson* (1900), A. C., 271; 69 L. J., P. C., 32; 82 L. T., 473.

personally liable to make good such loss.[1] It was formerly held that trustees selling property were not justified in employing a solicitor to receive the purchase-money, and that, where they, having sold property, left the conveyance executed by them, and having their receipt endorsed thereon, in the hands of their solicitor, to complete and hand them the money, and such solicitor received and misapplied the amount, they were liable to make it good, for they were but agents or delegates, and *delegatus non potest delegare*.[2] And in fact on sales by trustees, the purchaser was actually held not to be safe in paying to the solicitor of the trustees, or even to one of the trustees under an authority from the others; but was obliged to pay to all the trustees, who must attend personally to receive it, or else he must pay it into a bank, at their request, in their joint names.[3] The rule still prevails that a purchaser cannot ordinarily pay to one of several trustees, their powers being joint only. But with regard to payment to the trustees' solicitor, the Trustee Act 1893[4] now enacts that a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money, valuable consideration, or property receivable by such trustee under the trust, by permitting such solicitor to have the custody of, and to produce a deed containing a receipt in its body, or endorsed thereon, such deed being executed, or the endorsed receipt signed, by the person entitled to give a receipt. It also provides that no trustee is to be chargeable with

Trustees formerly could not depute solicitor to receive purchase-money.

Provision of Trustee Act 1893 hereon.

[1] The contrary was held by Lord Romilly in *Hopgood* v. *Parkin*, L. R., 11 Eq., 70, but this decision cannot be reconciled with the decision of the Court of Appeal in *Re Speight*, *Speight* v. *Gaunt*, 9 App. Ca., 1; 53 L. J., Ch., 419; and Lord Justice Lindley in that case expressly dissented from *Hopgood* v. *Parkin*.

[2] *Ghost* v. *Waller*, 9 Beav., 497.

[3] *Re Ballamy & Metropolitan Board of Works*, 24 Ch. D., 387; 52 L. J., Ch., 870; *Re Flower & Metropolitan Board of Works*, 27 Ch. D., 592; 53 L. J., Ch., 955.

[4] 56 & 57 Vict., c. 53, sec. 17, being a similar provision to that contained in the Trustee Act 1888 (sec. 12), now repealed.

breach of trust by reason only of his having made or concurred in such appointment of a solicitor; and the producing of such deed by such solicitor is to have the same validity and effect as if the person appointing the solicitor had not been a trustee[1]—*i.e.*, it is a sufficient authority for the party liable, to pay to the solicitor without any separate authority from the trustee. But a trustee is not exempted from liability if he lets the money, valuable consideration, or property remain in the hands, or under the control, of the solicitor any longer than is reasonably necessary for the solicitor to pay or transfer the same to the trustee.[2] Further, the same Act[3] provides that a trustee may, without breach of trust, appoint a banker or solicitor to be his agent, to receive and give a discharge for any money payable to him under a policy of assurance, by permitting such banker or solicitor to have the custody of and produce the policy, with a receipt signed by such trustee; but here again the trustee is not to be exempt from liability if he leaves such money in the hands, or under the control, of the banker, or solicitor, for longer than is reasonably necessary for the banker or solicitor to pay it over to the trustee.[4]

Policy moneys

Liability for failure of bank.

Trustees are not liable if, in the ordinary discharge of duty, they deposit money temporarily in a bank and the bank fails[5]; but it must not be more than a mere temporary deposit, so that where trustees left money on deposit at a bank for a period of fourteen months, and the bank failed, they were held liable.[6]

Or auctioneer.

Nor will trustees be liable for the misapplication by

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[1] See 44 & 45 Vict., c. 41, sec. 56.
[2] 56 & 57 Vict., c. 53, sec. 17 (3).
[3] Sec. 17 (2).
[4] These provisions only apply where the money or property has been received after 24th December, 1888 (56 & 57 Vict., c. 53, sec. 17 4)).
[5] *Swinfen* v. *Swinfen*, 29 Beav., 211; *Fenwicke* v. *Clarke*, 31 L. J., Ch., 728.
[6] *Cann* v. *Cann*, 33 W. R., 40; 51 L. T., 770.

an auctioneer employed by them of a deposit on a sale necessarily left in the hands of the auctioneer, in accordance with the conditions.[1]

Liability of trustees neglecting to invest.

Where trustees neglect to invest money, or improperly invest it, the general rule is that they are liable for the fund with interest at 4 per cent. per annum[2]; but in certain cases they may be liable for more, *e.g.*, where they have improperly called in a security carrying a higher rate of interest, or have in any other way been guilty of gross misconduct. And where a trustee has employed the trust property in trade or speculation, he will be liable, at the option of the beneficiaries, either to pay compound interest at 5 per cent., with yearly and even half-yearly rests, if he may reasonably be presumed to have made that amount, or to account for all profits made by him.[3] Where trustees are guilty of two distinct breaches of trust, one of which causes a loss to the trust estate, and the other a gain, they are not allowed to set off the gain against the loss, but they must account for the full gain, and make good the full loss.[4]

Gain cannot be set off against loss.

Contribution and indemnity between trustees.

Every trustee is, in general, liable for the whole loss to the trust estate, caused by any breach of trust; and where there is a judgment against several trustees in respect of a breach of trust, it may be enforced against them all, or against one or more only. Still, as between themselves, although all

[1] *Edmunds* v. *Peake*, 7 Beav., 239.

[2] *Robinson* v. *Robinson*, 1 De G., M. & G., 247. It was formerly 4 per cent., but, having reference to the difficulty at the present day in finding sound 4 per cent. investments, the rate has been altered to 3 per cent. See *Re Barclay*, *Barclay* v. *Andrew* (1899), 1 Ch., 674; 68 L. J. Ch., 383; 80 L. T., 702; *Rowlls* v. *Bebb* (1900), 2 Ch., 107; 69 L. J., Ch., 562; 82 L. T., 633; 48 W. R., 562.

[3] Underhill's Trusts, 372; *Vyse* v. *Foster*, 8 Ch. App., 309; 42 L. J., Ch., 245; *Davis* v. *Davis* (1902), 2 Ch., 314; 71 L. J., Ch., 539; 86 L. T., 523.

[4] *Wiles* v. *Gresham*, 1 Drew, 258.

liable, yet if the breach of trust does not amount to actual fraud, those who have had to refund the loss to the trust estate will be entitled to contribution from the others.[1] Where, however, one of several trustees has got the benefit of a breach of trust, or has been the confidential legal adviser of his co-trustees, he may be called upon to indemnify his co-trustees, and to bear the whole loss himself.[2] Where the breach of trust has been committed by one only of the trustees, but yet they are all liable in respect of it, as a general rule there is no right of indemnity so as to render the one trustee who directly committed the breach of trust liable to indemnify his co-trustees, provided that, though acting erroneously, yet he acted perfectly honestly.[3] But such a right of indemnity exists in exceptional cases, where the non-acting trustees have some independent right to indemnity, *e.g.*, where the acting trustee has been a solicitor, and, acting as such for the trust, has by negligence or improper conduct lost the trust fund.[4] And it has been held that if one of the trustees is also a *cestui que trust*, and has, by reason of that position, derived a benefit from the breach of trust, he is bound to indemnify his co-trustees to the extent of his beneficial interest in the trust property, and this even although he did not become a *cestui que trust* until after the breach of trust was committed.[5]

Robinson v. *Harkin.*

Chillingworth v. *Chambers.*

Trustees' powers are joint only.

Trustees' powers are joint and several. Therefore, in the case of trustees joining in receipts, as they have but a joint authority, and their joining is accordingly

[1] *Robinson* v. *Harkin* (1896), 2 Ch., 415; 65 L. J., Ch., 773; 74 L. T., 777; *Jackson* v. *Dickinson* (1903), 1 Ch., 947; 72 L. J., Ch., 671; 88 L. T., 507.

[2] Underhill's Trusts, 404.

[3] *Robinson* v. *Harkin, supra.*

[4] *Bahin* v. *Hughes*, 31 Ch. D., 390; 55 L. J., Ch., 472; 54 L. T., 188.

[5] *Chillingworth* v. *Chambers* (1896), 1 Ch., 685; 65 L. J., Ch., 343; 74 L. T., 34.

necessary for conformity, no presumption of receipt of the money will usually arise; but in the case of executors, as they, ordinarily, have not merely a joint, but also a several power, if they have joined in signing a receipt, a presumption that each has actually received the money arises, though that presumption is capable of being rebutted.[1] But although trustees' powers are joint, and, therefore, as regards receiving capital they must all join, this does not apply to the income of the trust property, for one of them may be delegated by the others to receive this.[2]

Brice v. *Stokes.*

A trustee is not allowed to make any profit out of his trust estate, and, therefore, although he may claim to be reimbursed all proper expenditure (and such claim constitutes a first charge on all the trust property, both income and corpus[3]), he cannot claim to be remunerated, even although his services may have been productive of great benefits to his *cestui que trust.*[4] To this rule there are, however, exceptions, for a trustee is entitled to be remunerated: (1) Where the trust instrument provides for such remuneration[5]; (2) Where at the time of accepting the trust he expressly stipulated with beneficiaries, who were *sui juris*, for a remuneration, and there was no unfair pressure on his part; (3) Where the Court has expressly allowed remuneration, and by the Judicial Trustee Act 1896[6] it has now been expressly provided that in any proper case the Court may appoint a "judicial trustee," who may be remunerated; and (4) Where the trust

Trustee not remunerated.

Exceptions.

[1] *Brice* v. *Stokes*, 2 Wh. & Tu., 633, and notes.
[2] Underhill's Trusts, 254, 255.
[3] *Stott* v. *Milne*, 25 Ch. D., 710; 50 L. T., 742; Brett's Eq. Cas., 207.
[4] *Barrett* v. *Hartley*, L. R., 2 Eq., 787.
[5] When the trust instrument is a will, and thus provides for remuneration, the amount thereof is liable to legacy duty, *Re Thorley*, *Thorley* v. *Massam* (1891), 2 Ch., 613; 60 L. J., Ch., 537; 64 L. T., 515.
[6] 59 & 60 Vict., c. 35, sec. 1.

As to a trustee purchasing the trust property.

property is abroad, and it is the custom of the local courts to allow remuneration.[1] And as a necessary outcome of this same principle, a trustee is not allowed to have a purchase or lease or mortgage of the trust property, either from himself or from his co-trustees, unless the trust instrument or an order of Court allows it[2] or he has long since retired.[3]

Fox v. *Mackreth.*

And if a trustee purchases from his *cestui que trust*, the transaction will be set aside[4] unless the trustee can clearly show that his *cestui que trust* (being, of course, *sui juris*) was fully aware of his purchasing, and thoroughly understood the transaction, and that he disclosed all possible facts which might affect the matter, and took no advantage of his position, but paid full value.[5] And for such a transaction to stand, the trustee must always purchase openly in his own name, and not privately in the name of a third person, for if he does this the transaction can always be set aside, even though fair. The whole onus is on a trustee who purchases to show the fairness and propriety of the transaction, and generally to support his purchase; and it may, in fact, be stated that, practically, no trustee can safely purchase the trust property without coming to the Court for its sanction, and in doing this he must take care to be fair and open, and not in any way obtain the approval of the Court by the suppression of any facts that ought to have been disclosed, or by any mis-statements. If he comes to the Court thus openly and fairly, and purchases with the Court's sanction, then he will be safe.[6]

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[1] Underhill's Trusts, 260.

[2] *Williams* v. *Scott* (1900), A. C., 499; 69 L. J., P. C., 77; 82 L. T., 727.

[3] *Re Boles* (1902), 1 Ch., 244; 71 L. J., Ch., 130; 85 L. T., 607.

[4] *Fox* v. *Mackreth*, 2 Wh. & Tu., 709.

[5] Underhill's Trusts, 264. This principle does not apply to a person who was a trustee, but who for a considerable space of time has ceased to be so, *Re Boles*, *supra*.

[6] *Coaks* v. *Boswell*, 11 App. Ca., 232; 55 L. J., Ch., 761; 55 L. T., 32.

Where an express trustee had been guilty of a breach of trust, the rule was formerly absolute, that he must remain continually liable for it, and that lapse of time formed no bar to a claim against him by his *cestui que trust*, who had not acquiesced therein and had not been guilty of any laches; and this was a rule which always existed in Equity, and which was made the general law by Section 25 of the Judicature Act 1873. But the rule was that implied and constructive trustees could plead the Statute of Limitations,[1] except where a person in a fiduciary position thereby obtained control of property, or where a person assisted a trustee to fraudulently dispose of the property, or where a stranger to a trust made himself trustee *de son tort*, or where a person received trust property and knowingly dealt with it contrary to the trusts.[2] However, all trustees may now generally rely on the Statutes of Limitation, for it is now provided by the Trustee Act 1888[3] that as regards any actions or proceedings commenced after 1st January, 1890, the rights and privileges conferred by any Statute of Limitations, either directly or by analogy, shall be fully enjoyed by trustees[4] except where the claim is founded on fraud, or fraudulent breach of trust, to which the trustee was party or privy,[5] or is to recover trust property, or the proceeds thereof, still

Effect of time as regards trustees' breaches of trust.

Provision of Trustee Act 1888.

[1] *Petre* v. *Petre*, 1 Drew, 371; *Knox* v. *Gye*, 5 H. L., 656.

[2] *Soar* v. *Ashwell* (1893), 2 Q. B., 390; 69 L. T., 585; 42 W. R., 165.

[3] 51 & 52 Vict., c. 59, sec. 8.

[4] This does not apply to a trustee in bankruptcy (*Re Cornish* (1896), 1 Q. B., 99), but it does to a director of a company, so that where a liquidator sought under the Companies Winding Up Act 1890 (53 & 54 Vict., c. 53, sec. 10) to recover from directors assets of a company improperly applied by them, it was held that the directors were entitled to plead the Statute of Limitations as a defence in any case where trustees could do so under the provisions mentioned in the text; not that they are strictly trustees, but because the Court has always treated them as standing in a similar position to trustees (*Re Lands Allotment Company, Limited* (1894), 1 Ch., 616; 63 L. J., Ch., 291; 70 L. T., 286).

[5] See *Thorne* v. *Heard* (1895), A. C., 495; 64 L. J., Ch., 652 Brett's Eq. Cas., 202.

retained by the trustee, or previously received by him and converted to his use.[1] If, therefore, a trustee is merely guilty of negligence—say of not investing, or of having lost or otherwise injured the trust property by some improper investment—the Statute of Limitations may be pleaded, and any claim will be barred after six years, for a breach of trust creates merely a simple contract debt.[2] But if the trustee has been guilty of direct fraud or misappropriation, then it is otherwise, and the rule remains, as it has always been, that the only bar to the *cestui que trust's* rights is laches and acquiescence. In cases where trustees may take advantage of the Statute of Limitations, the statute ordinarily begins to run from the time the breach was committed, but in the case of a beneficiary entitled in remainder, not until his interest falls into possession.[3] In one case, a tenant for life and his infant children sued trustees to make good a breach of trust. The breach of trust consisted of an excessive amount having been advanced on mortgage in the year 1878, and it was only discovered that the security was insufficient in the year 1890, and the action was brought in 1892. It was held that the trustees were not liable to the tenant for life, as six years had elapsed since the date of the advance; but that the trustees were liable to the infant remaindermen for the lost capital.[4]

Where Statute of Limitations applies, time from which it runs.

Re Somerset.

Laches and acquiescence.

But irrespective of the Trustee Act 1888, trustees may be released from liability by reason either of laches or acquiescence on the part of their *cestuis que trustent.* The expression "laches" signifies a

[1] See *Wassell* v. *Leggatt* (1896), 1 Ch., 554; 65 L. J., Ch., 240; 74 L. T., 99.

[2] *Holland* v. *Holland*, L. R., 4 Ch. App., 449; 38 L. J., Ch., 252. See also *Re Timmis*, *Nixon* v. *Smith*, W. N. (1901), 242; *Law Students' Journal*, Jan., 1902, p. 6.

[3] 51 & 52 Vict., c. 59, sec. 8.

[4] *Re Somerset*, *Somerset* v. *Earl Poulett*, 62 L. J., Ch., 720; 68 L. T., 613; 41 W. R., 536.

neglect, a lying by, and not enforcing a demand after knowledge of one's rights. Acquiescence means more than laches, signifying a kind of permission, as standing by and knowingly permitting a thing to be done. The rule of the Court has always been that every *cestui que trust*, who is *sui juris*, and who is aware of his claim against his trustee, must proceed with reasonable diligence to enforce it, for the maxim is *Vigilantibus non dormientibus æquitas subvenit*, and if therefore the *cestui que trust* lies by for a long time, he is not allowed to bring forward his stale demands. And as the Trustee Act 1888 does not say that a *cestui que trust* shall necessarily have the fixed statutory time for taking proceedings against his trustee, but merely says that, after the statutory period no action can be maintained, it is apprehended that the effect of the enactment is to fix a statutory period after which, with respect to certain breaches of trust, no action can possibly be maintained, but to still leave the Court a discretion, as heretofore, to refuse to interfere during any earlier period. Certainly, also, the rule remains the same, that if a *cestui que trust* who is *sui juris* has acquiesced, or concurred, in a breach of trust, in fact been a party to it, he shall not be allowed to complain of it.[1]

Cestui que trust who is not *sui juris* concurring in breach of trust.

And a *cestui que trust* who is even not *sui juris*, but who has concurred in a breach of trust, is not allowed to afterwards charge the trustee if he has himself been guilty of any fraud, for "He who comes into Equity must come with clean hands"[2]; but, until lately, this principle did not apply to a married woman in respect of property settled upon her for her separate use without power of anticipation.[3]

[1] *Re Somerset, Somerset* v. *Earl Poulett*, 62 L. J., Ch., 720; 68 L. T., 613; 41 W. R., 536.

[2] *Sharp* v. *Foy*, L. R., 4 Ch., 35; 17 W. R., 65. As to this maxim, see *ante*, p. 20.

[3] *Stanley* v. *Stanley*, 7 Ch. D., 589; 47 L. J., Ch., 256.

Provision of Trustee Act 1893.

There is, however, now a general provision in the Trustee Act 1893, which appears to cover even this case, viz.: That where a trustee commits a breach of trust at the instigation, or request, or with the consent in writing, of a beneficiary, the Court may —even if the beneficiary is a married woman entitled for her separate use without power to anticipate— impound all or any part of the beneficiary's interest, to indemnify the trustee or any one claiming through him.[1] On this provision it has been decided that the words "in writing" apply only to consent, and not to instigation or request.[2] It has also been held that the discretion which is conferred upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee, may be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts constituting the breach of trust; and, therefore, where the trustee for a married woman, who was tenant for life without power of anticipation, advanced part of the capital to her upon her request, and her statement that the money was needed to prevent her home being sold up, it was held that the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the income payable to the married woman.[3] Still, it is generally the duty of a trustee to protect a married woman against herself when she, as a beneficiary restrained from anticipation, asks him to commit a breach of trust, and he must not deliberately commit a breach of trust at the request, or with the consent, of such a beneficiary, in the hope that the Court will afterwards assist him by removing the restraint. One

Impounding *cestui que trust's* interest to indemnify trustee.

[1] 56 & 57 Vict., c. 53, sec. 45, in place of the similar repealed provision of the Trustee Act 1888 (sec. 6). It is retrospective except as to actions pending on 24th December, 1888.

[2] *Griffiths* v. *Hughes* (1892), 3 Ch., 105; 62 L. J., Ch., 135; 66 L. T., 760.

[3] *Ibid.*

of the facts to be borne in mind by the Court in the exercise of its discretion certainly is, whether the breach of trust was committed by the trustee knowingly, but the Court will look at the whole circumstances of each particular case.[1] The Court being, therefore, able to impound the beneficiary's interest, would not, it is apprehended, give relief against the trustee at the instance of such a beneficiary who has consented in writing, or has instigated, or requested, the breach of trust to be committed.

As to a stranger to a trust being held liable as a trustee.

It is not always easy to determine whether a stranger to a trust has become a trustee *de son tort* and so incurred the liabilities of a trustee. It may, however, be stated, as a general rule, that a stranger to a trust, acting as agent of the trustees in transactions within their legal powers, may be held liable as a trustee if he receives and becomes chargeable with part of the trust property, and will certainly be held liable if he acts with knowledge of a dishonest and fraudulent design on the part of the trustee.[2] The mere fact, however, that an agent, *e.g.*, a solicitor, knows that a technical breach of trust is being committed in the matter in which he is acting, is not sufficient to render him liable. Thus, where a solicitor received from a trustee, for whom he was acting, a sum of trust money which on the trustee's instructions, and without giving any advice, he invested on an insufficient security, he was held not to be liable for the loss[3]; but he would be liable if he invested by direction of the trustees on an unauthorised investment.[4] In another case

Brinsden v. *Williams.*

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[1] *Bolton* v. *Curre* (1895), 1 Ch., 544; 64 L. J., Ch., 164; 71 L. T., 752.
[2] *Barnes* v. *Addy*, L. R., 9 Ch., 244; Brett's Eq. Cas., 187.
[3] *Brinsden* v. *Williams* (1894), 3 Ch., 185; 63 L. J., Ch., 713; 71 L. T., 177.
[4] *Blyth* v. *Fladgate* (1891), 1 Ch., 337; 60 L. J., Ch., 66; 63 L. T., 546; *Soar* v. *Ashwell* (1893), 2 Q. B., 390; 69 L. T., 585; 42 W. R., 165.

Mara v. *Browne.*

a solicitor was held not to be liable as a constructive trustee where the trust money had been invested on improper securities (mortgages of speculative building property without sufficient margin taken in 1884) even although the investment was made at his instigation, simply because the trustees had handed him the money to advance on each specific mortgage; but the Court held he might have been sued for negligence as a solicitor.[1] And where a trustee draws a cheque on his trust account and pays it into his overdrawn private account at the same bank, that will not make the bank liable to the beneficiaries as trustee *de son tort*, unless the bank had designed or stipulated for a benefit to itself, or knew that the trustee was insolvent or intended to commit a breach of trust.[2]

Bankruptcy.

Even bankruptcy does not exonerate a trustee from the consequences of his fraudulent breach of trust, it being expressly provided by the Bankruptcy Act 1883[3] that an order for discharge shall not release the bankrupt from any debt or liability incurred by means of any fraudulent breach of trust *to which he was a party*.[4] It should also be noticed that trust property in the possession of a person who becomes bankrupt does not pass to his trustee, but may be followed and claimed by the *cestui que trust*.

Trustee should not mix trust money with his own.

It is an improper act on the part of a trustee ever to mix trust money with his own, and, therefore,

[1] *Mara* v. *Browne* (1896), 1 Ch., 199; 65 L. J., Ch., 225; 73 L. T., 638.

[2] *Gray* v. *Johnston* (1868), L. R., 3 H. L., 1; *Foxton* v. *Manchester and Liverpool Bank*, 44 L. T., 406; *Thomson* v. *Clydesdale Bank* (1893), A. C., 282; 62 L. J., P. C., 91; 67 L. T.. 156; *Coleman* v. *Bucks and Oxon Union Bank* (1897), 2 Ch., 243; 66 L. J., Ch., 564; 76 L. T., 684.

[3] 46 & 47 Vict., c. 52, sec. 30.

[4] With regard to the italicised words, see as to the position prior to this Act, *Cooper* v. *Pritchard*, 11 Q. B. D., 371; 52 L. J., Q. B., 526.

when he is guilty of doing so, the onus is on him to show which part of the fund is his own, and which is trust money, and in so far as he fails in doing this, it will all be presumed to be trust money. And where a trustee has in any way misapplied trust money, has wrongfully converted it, or has invested it in some unauthorised shape, the rule is that a *cestui que trust* can follow the trust property, so long as it is capable of being earmarked and identified, into the hands of all persons and get it back, unless (1) it is a negotiable instrument which has got into the hands of a holder in due course, or (2) it is other property which has got into the hands of a *bonâ fide* purchaser for value who has acquired the legal estate without notice of the trust.[1] And it may be added that when a purchaser without notice sells to a purchaser with notice, the latter gets the good title of the former, unless the latter is the original trustee.[2] And on this principle, it has been held that if a person into whose possession money comes as trustee for another pays it into his private account at a bank and lets it rest there, and then draws cheques in the ordinary manner, the presumption is that he draws his cheques on that part of the money at his bank which is not trust money, and the money remaining at his bank will be presumed, to the necessary extent, to still be the trust money, so as to enable the *cestui que trust* to follow and claim it.[3]

Following and tracing trust money.

Re Hallett's Estate.

If a trustee has wrongfully applied trust money in the purchase of land, the *cestui que trust* can claim the land. And whenever a trustee has been guilty of any breach of trust of this character, if all the

Lien on land purchased.

[1] *Rimmer* v. *Webster* (1902), 2 Ch., 163; 71 L. J., Ch., 561; 86 L. T., 491; *Re Morgan*, 18 Ch. D., 93; 50 L. J., Ch., 834; 45 L. T., 183, also *ante*, p. 10.

[2] Underhill's Trusts, 427.

[3] *Re Hallett's Estate*, 13 Ch. D., 696; 49 L. J., Ch., 415; Brett's Eq. Cas., 194. See also, *post*, 183.

cestuis que trustent are *sui juris*, they can collectively elect to adopt the breach and take the property as it stands; but if one of them objects, he may require it to be reconverted, and in that event any gain accrues to the trust estate, and any loss falls on the trustee.[1] Where a trustee has applied trust money and some of his own money in the purchase of land, the *cestui que trust* cannot elect to take the land, but has a lien or first charge upon it for the trust money embarked thereon.[2]

Improper employment of trust property for partnership purposes.

It is convenient here to notice that the Partnership Act 1890[3] provides that if a partner, being a trustee, improperly employs trust property in the business of the partnership, no other partner is liable for the trust property to the persons beneficially entitled, provided, however, (1) this shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust, and (2) this shall not prevent trust property being followed and recovered from the firm, if still in its possession or under its control.

What care and diligence trustees bound to use.

Trustees are, as has been stated,[4] in general unremunerated, and therefore, looked at by analogy to the rules of law relating to voluntary bailees, it would at first sight appear that they ought to be liable only for gross neglect. Principles of policy, and general utility, especially having reference to the frequently helpless state of the *cestuis que trustent*, have probably led to the law being, as it is, considerably different to this, and the whole matter of trustees' liability may be shortly summed up thus:—Certain things have been established by

The rule.

[1] *Re Patten*, 52 L. J., Ch., 787; 48 L. T., 870; 31 W. R., 785; and *Power* v. *Banks* (1901) and *Re Jenkins & Randall* (1903), *ante*, p. 87.
[2] See per Jessel, M.R., in *Re Hallett's Estate*, *ante*, p. 109.
[3] 53 & 54 Vict., c. 39, sec. 13.
[4] *Ante*, p. 101.

the Court to be the duties of trustees, and to all such things the Court requires a rigid adherence, and any departure therefrom will subject the trustee to liability. With regard to other matters trustees must exercise care, diligence, and forethought, and if they fail to act as men of prudence should act in the management of their own affairs, they will be liable.[1] And even although trustees are remunerated, it is doubtful if their liability is thereby increased. It has been held that a trustee, even though remunerated, is not liable for loss occasioned to the trust estate by the felonious acts of his servant, providing such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence.[2]

Jobson v. *Palmer.*

A trustee who retires is not ordinarily liable for breaches of trust committed after he has ceased to be a trustee. In order to make him so liable, it must be clearly shown that the very breach of trust which was in fact committed was contemplated by the former trustees when the retirement took place, and that he was guilty as an accessory before the fact to such breach of trust. It is not sufficient to prove that the retiring trustee rendered easy, or even intended, a breach of trust, if the breach of trust so intended was not in fact committed.[3]

Liability of a retiring trustee.

Head v. *Gould.*

Trustees are bound to give reasonable information to their *cestuis que trustent* as to the state of the trust property, and how invested,[4] and permit them or their solicitors to inspect and verify the securities

Trustees must give certain information.

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[1] Smith's Manual, 157, 158.
[2] *Jobson* v. *Palmer* (1893), 1 Ch., 71; 62 L. J., Ch., 180; 67 L. T., 797.
[3] *Head* v. *Gould* (1898), 2 Ch., 250; 67 L. J., Ch., 480; 78 L. T., 739; 46 W. R., 597.
[4] *Re Dartnall, Sawyer* v. *Goddard* (1895), 1 Ch., 474; 64 L. J., Ch., 641; 72 L. T., 404.

and accounts,[1] though copies of accounts and documents and other information involving expense must be paid for by the *cestui que trust* who requires it.[2] But trustees are not bound to answer an enquiry as to whether a *cestui que trust* has encumbered, though if they do answer an enquiry on this point they must give what they believe to be a true answer.

Low v. *Bouverie.*

In one case,[3] in answer to an enquiry addressed by an intending mortgagee to the trustee of a fund, whether the life tenant had encumbered his interest, the trustee enumerated certain specific charges, but had, in fact, received notice of certain other charges which he had forgotten. The intending mortgagee advanced his money, and suffered a loss, and sought to recover it from the trustee. It was held that the trustee was not liable in the absence of estoppel, and that his answer did not amount to a positive representation that there were no other incumbrances on the life interest, so as to create an estoppel against him. Of course, in distributing a trust fund, it is the duty of all the trustees to act upon the notices of incumbrances they have all, or each, received, and it has been held that to this extent notice to one trustee is notice to all. Consequently, an intending incumbrancer cannot safely take a charge upon a trust fund without ascertaining from each then existing trustee that he has no notice of any existing charge,[4] and even then he may run some risk. It must not, however, from this be

Estoppel.

Ward v. *Duncombe.*

[1] *Re Tillott, Lee* v. *Wilson* (1892), 1 Ch., 86; 61 L. J., Ch., 38; 65 L. T., 781.

[2] *Re Bosworth, Martin* v. *Lambe*, 58 L. J., Ch., 432. A trustee who neglects to furnish a copy of the trust accounts on request, will be ordered personally to pay all parties' costs of an action by the beneficiary as between solicitor and client, although he has acted honestly and there is no loss of the trust funds, *Re Linsley, Cattley* v. *West* (1904), 2 Ch., 785; 73 L. J., Ch., 841; 53 W. R., 172.

[3] *Low* v. *Bouverie* (1891), 3 Ch., 82; 60 L. J.. Ch., 594; 65 L. T., 533. See also hereon *Burrowes* v. *Lock*, 1 Wh. & Tu., 446, which is a case of Equitable Estoppel.

[4] *Ward* v. *Duncombe* (1893), A. C., 369; 62 L. J., Ch., 881; 69 L. T., 121.

assumed that an incumbrancer of a *cestui que trust's* interest is safe in giving notice to one only of several trustees. He should give notice to all, for though he is safe as long as the trustee to whom he has given notice lives, if such trustee dies or retires without having communicated the notice to his co-trustees, a subsequent incumbrancer without notice, whose incumbrance was created after the death or retirement of the trustee who had notice, and who gives notice to the then trustees, will be preferred.[1] If notice is given to all the trustees, and they retire or die, and new trustees are appointed to whom the notice is not passed on, the notice nevertheless remains effectual, and if a further assignment or disposition is made, and notice thereof is given to the new trustees, the right of the prior assignee nevertheless prevails.[2] It is manifestly, therefore, always advisable to give notice to all the trustees.

Re Wasdale.

With a view of protecting trustees, a clause used to be commonly inserted in trust instruments called the indemnity and reimbursement clause. But such a clause is now unnecessary, it being provided that a trustee shall, without prejudice to the provisions of the instrument (if any) creating the trust, be chargeable only for moneys and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities,

Indemnity and reimbursement of trustees.

[1] *Timson* v. *Ramsbottom*, 2 Keen, 35; *Meux* v. *Bell*, 1 Hare, 73; *Ward* v. *Duncombe*, *ante*, p. 112; and see generally as to the necessity of notice, and the rule in *Dearle* v. *Hall*, *ante*, pp. 16, 17.

[2] *Re Wasdale*, *Britten* v. *Partridge* (1899), 1 Ch., 163; 68 L. J., Ch., 117; 79 L. T., 520; 47 W. R., 169.

nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay, or discharge out of the trust property, all expenses incurred in or about the execution of his trusts and powers.[1] This provision does not, however, seem of any great value to trustees, for, without it, a trustee is, as has already been stated,[2] entitled to reimburse himself all proper expenses out of pocket, and, as to indemnity, the provision is of a very general nature, and does not protect him from liability for breaches of duty. Practically the enactment only expresses the rule of the Court of Equity.[3] The right of a trustee to reimbursement and indemnity is usually limited to the trust funds; but if the only beneficiary is *sui juris* and is not in a position to disclaim the property, the trustee has an equitable right to reimbursement and indemnity against that beneficiary personally.[4] In some instruments, however, a wider clause of indemnity is inserted, which may be so framed as to protect the trustee from all defaults other than his own personal misconduct.[5] As to a trustee being entitled to be reimbursed expenses out of pocket, it must be borne in mind, in the absence of an express provision in the trust instrument to the contrary, that he is entitled to no more, nothing for his loss of time, or inconvenience, being allowed him. This rule is the same even if he is a solicitor, unless he is specially authorised by the trust instrument to make his charges; but even then the charges that he may make must be strictly professional,[6] that is, for things which he could

Employing a solicitor.

[1] 56 & 57 Vict., c. 53, sec. 24, which is in substitution for the now repealed provision of 22 & 23 Vict., c. 35, sec. 31.

[2] *Ante*, p. 101.

[3] *Re Brier*, *Brier* v. *Evison*, 26 Ch. D., 238; 51 L. T., 133.

[4] *Hurdoon* v. *Belilios* (1901), A. C., 118; 70 L. J., P.C., 9; 83 L. T., 573.

[5] *Wilkins* v. *Hogg*, 8 Jur., N. S., 25; *Pass* v. *Dundas*, 29 W. R., 332.

[6] *Clarkson* v. *Robinson* (1900), 2 Ch., 722; 69 L. J., Ch., 859; 83 L. T., 164; 48 W. R., 698.

properly instruct a solicitor for, and not for ordinary work in connection with the trust, which he ought to do himself,[1] unless indeed the words in the special clause[2] are so wide as to justify him in charging for other than strictly professional work.[3] And even if a solicitor is appointed executor and trustee of a will with power to make his charges, he is not entitled to any profit costs as against the creditors if the estate proves insolvent.[4] But without any express provision to that effect, trustees may always employ a solicitor for all things in respect of which it is reasonable to employ one, though not in the ordinary routine trust business; for, if they instruct a solicitor in matters of this kind, they are liable to have to pay the costs thus unnecessarily incurred out of their own pockets. Where one of several trustees is a solicitor, he may be employed to act in any litigation in the matter of the trust, and may charge his ordinary costs, but this does not apply to business out of Court, *i.e.*, to conveyancing and other ordinary

Re White, Pennell v. *Franklin.*

One of several trustees a solicitor.

[1] *Re Chapple, Newton* v. *Chapple*, 27 Ch. D., 584; 51 L. T., 748.

[2] The following is the special clause approved by the Council of the Law Society in 1903:—

"It is hereby declared that the executors or executor, or trustees or "trustee, for the time being may, instead of acting personally, employ "and pay a solicitor or any other person to transact any business or do "any act of whatever nature required to be done in the executorship or "trust, including the receipt and payment of money. And, further, "that any executor or trustee hereunder, being a solicitor or other "person engaged in any profession or business, may be so employed; "or, being a sole executor or trustee, may so act, and shall be entitled "to charge and be paid for all work done and time expended by him "or his firm in relation to the executorship or trust, including acts "which a trustee not being in any profession or business could have "done personally."

[3] *Re Ames, Ames* v. *Taylor*, 25 Ch. D., 72; 32 W. R., 287. It has been held that where a solicitor is appointed trustee or executor, by a will which authorises him to make his charges, he is deriving a benefit under the will, and if he attests the will his fate must be the same as that of any other beneficiary, that is, he must lose his benefit, and therefore he cannot in such a case make his charges (*Re Pooley*, 40 Ch. D., 1; 58 L. J., Ch., 1), and see as to the effect of a subsequent codicil, *Re Trotter, Trotter* v. *Trotter* (1899), 1 Ch., 764; 68 L. J., Ch., 363; 80 L. T., 647.

[4] *Re White, Pennell* v. *Franklin* (1898), 1 Ch., 297; 67 L. J., Ch., 139; 77 L. T., 793; 46 W. R., 247.

business, as opposed to litigious work.[1] The reason for this distinction is, that the rule was originally established with regard to litigious business, and the Court has in later cases refused to extend it.[2]

Effect of institution of proceedings on trustees' powers.

The mere fact that proceedings are instituted for the carrying out of a trust under the direction of the Court does not take away the powers of a trustee; but when a judgment has been given in such proceedings, or when the Court thinks fit to grant an injunction restraining the trustees acting, then they have no further power without the Court's sanction. Thus, after judgment for administration or carrying out of trusts under the Court's direction, a trustee cannot prosecute or defend legal proceedings, nor exercise a power of sale, nor do other similar acts without applying to the Court; nor can he claim, under a power conferred upon him by the trust instrument, to postpone the time of selling property which the Court thinks should be sold at once. His powers are, in fact, so far paralyzed that the authority of the Court must sanction every subsequent proceeding.[3] But where a trust is discretionary in its nature, such discretion not relating to practical matters as to the mode of dealing with the property and carrying out the trust, but affecting the rights and interests of beneficiaries, the Court will not interfere with the discretion, unless exercised *malâ fide*, or in a way incompatible with the trust.[4]

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[1] *Craddock* v. *Piper*, 15 L. T., 61; *Re Corsellis*, *Lawton* v. *Elwes*, 34 Ch. D., 675; 56 L. J., Ch., 294; 56 L. T., 411; *Re Barber*, *Burgess* v. *Vinnicomb*, 34 Ch. D., 77; 54 L. T., 375.

[2] See notes to *Re Corsellis*, *Lawton* v. *Elwes*, in Brett's Eq. Cas., 220.

[3] Lewin on Trusts, 730; *Minors* v. *Battison*, 1 App. Ca., 428; 46 L. J., Ch., 2; Brett's Eq. Cas., 164.

[4] *Gisborne* v. *Gisborne*, 2 App. Ca., 300; 46 L. J., Ch., 556; 25 W. R., 516; Brett's Eq. Cas., 158.

Difficulties of trustees, and former statutory provisions for their assistance.

It is evident that the position of a trustee is one of considerable difficulty. He may often be in doubt, either as regards the construction of the trust instrument and his duties thereunder, or on some point of law, or on a practical matter as regards the proper and best course to be taken. Before any statute was passed for the assistance of a trustee, when questions of doubt or difficulty arose, his only absolutely safe course was to have the estate administered under the Court's direction. This he could do either by getting some beneficiary to institute proceedings against him for the carrying out of the trust under the Court's directions, or he could himself apply to the Court for that purpose, making one or more of the beneficiaries defendants. He then was clearly quite safe with regard to all his future acts. But a trustee ought certainly to hesitate before taking such a step as this, and if he did not take this step, his only other course was to obtain the best advice possible, and act in accordance with it; but still if the advice turned out to be wrong, this did not absolve him from responsibility. Provisions were therefore made by the Trustee Relief Acts 1847 and 1849,[1] by which under certain circumstances a trustee could pay trust money into Court with a view to the Court determining the point involved, and by the Law of Property Act 1859,[2] under which he could apply to the Court in a summary way for its opinion, or direction, on any question touching the management of the trust property. These statutes have now been repealed by the Trustee Act 1893, which contains provisions similar to those contained in the Trustee Relief Acts 1847 and 1849, but very properly contains no substitutionary provision for that formerly contained in the Law of Property Act 1859, because of

[1] 10 & 11 Vict., c. 96; 12 & 13 Vict., c. 74.
[2] 22 & 23 Vict., c. 35, sec. 30.

the assistance provided by Order LV., rule 3, as presently mentioned.[1]

Trustee Act 1893.

The Trustee Act 1893[2] provides that trustees (which expression includes trustees under express, implied, and constructive trusts[3]), or the majority of them, having in their hands, or under their control, money or securities belonging to a trust, may pay the same into the High Court of Justice with a view to the same being dealt with as the Court may order; and if there are several trustees, and they do not all agree on this course of action, the Court may order payment into Court by the majority. The object of this provision is, of course, to afford to persons occupying the position of trustees, a means, in the event of difficulties or disputes arising, of having the same removed, and freeing themselves from responsibility. The payment into Court being thus made, the trustees must forthwith give notice to the several persons interested, and any one or more of these persons then applies to the Court asking for the fund to be dealt with, or disposed of, as he contends it should be, and the Court then hears and determines the matter.[4] A trustee is not, however, justified in putting his *cestuis que trustent* to this expense unless the circumstances present some real difficulty.

Order LV., rule 3.

But the enactment just referred to is only of assistance to trustees when there is some definite fund which can be paid or transferred into Court, and there are therefore manifestly many cases in which it cannot be taken advantage of. A very full and satisfactory provision is, however, contained in

[1] *Infra.*
[2] 56 & 57 Vict., c. 53, sec. 42.
[3] Sec. 50.
[4] As to the practice hereon, see Indermaur's Manual of Practice, 310-313.

Order LV., rule 3, of the Supreme Court of Judicature Rules, under which almost any question arising in the course of a trust may be determined. Under this provision an originating summons may be issued by trustees, or by any beneficiary, asking for the determination by the Court, without an administration of the trust, of any of the following questions or matters :—

(A) Any question affecting the rights or interests of a person claiming to be creditor, devisee, legatee, next-of-kin, heir-at-law, or *cestui que trust.*

(B) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others.

(C) The furnishing of any particular accounts by the executors, or administrators, or trustees, and the vouching (when necessary) of such accounts.

(D) The payment into Court of any money in the hands of the executors, or administrators, or trustees.

(E) Directing the executors, or administrators, or trustees to do, or abstain from doing, any particular act in their character as such executors, or administrators, or trustees.

(F) The approval of any sale, purchase, compromise, or other transaction.

(G) The determination of any question arising in the administration of the estate or trust.[1]

Sometimes optional to resort to Trustee Act 1893, or to Order LV., rule 3.

There are many cases in which it must be for the trustees to determine whether it is best for them to have recourse to Order LV., rule 3, or to pay the money into Court under the Trustee Act 1893; and either mode of procedure, if available, will be

[1] See as to the Practice under Order LV., rule 3, Indermaur's Manual of Practice, 322-325.

equally operative and effectual, for a trustee acting in accordance with the Court's directions is absolutely protected. But a trustee is not justified in putting his *cestuis que trustent* to the expense necessarily involved by either course, unless the circumstances present some real difficulty. The fact that an application has been made under Order LV., rule 3 does not interfere with or control any power or discretion vested in a trustee, except so far as any such interference or control may necessarily be involved in the particular relief sought.[1]

Cases of emergency.

In the administration of a trust, it is found that some peculiar state of circumstances occasionally arises for which no provision has been made by the trust instrument, and which makes it very desirable for the benefit of the estate and in the interest of all the beneficiaries that certain acts should be done by the trustees which, under ordinary circumstances, they would have no power to do. In an emergency of this kind, which it is reasonable to suppose the settlor did not foresee, the Court has power under its general jurisdiction to give its sanction for such acts being done by the trustees.[2] The most frequent examples of such cases are[3] to sanction advances for the benefit of an infant out of capital; to sanction the carrying on of a business which can only be realized at a break-up price but is yielding an income; to sanction the sale of a business or of a share therein to a company in exchange for shares and debentures; to concur in the reconstruction of a company; or to sanction the foreclosure of a mortgage where the trustees have no power to purchase real estate. But the Court will not exercise this

[1] Order LV., rule 12.

[2] Per Romer, L.J., in *Re New, Langham* v. *Langham* (1901), 2 Ch., 534; 70 L. J., Ch., 710; 85 L. T., 174; 50 W. R., 17.

[3] Per Kekewich, J., in *Re Tollemache* (1903), 1 Ch., 457; 72 L. J., Ch., 225; affirmed (1903), 1 Ch., 955; 72 L. J., Ch., 593.

extraordinary jurisdiction if there is no real urgency, or if the effect would be to create a new trust.[1]

Relief sometimes obtainable under the Judicial Trustees Act 1896.

A further provision has recently been made for the relief of trustees, who, acting honestly and reasonably, nevertheless find that they have committed a breach of trust. The Judicial Trustees Act 1896[2] enacts that if it appears to the Court that a trustee, whether appointed under that Act or not,[3] is or may be personally liable for any breach of trust, whenever the same occurred, but has acted honestly and reasonably,[4] and ought fairly to be excused both for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee, either wholly or partly, from personal liability for the same. It will be observed that, for a trustee to get relief under this provision, he must show that he has acted both honestly and reasonably, and ought fairly to be excused[5]; and whether the Court relieves him, or not, is entirely a matter in its discretion, and must depend on the circumstances of each particular case.[6]

The ending of trustees' duties.

When trustees' duties come to an end, they should require their *cestuis que trustent* to give them a release; and though they cannot demand a release under seal that is a matter of small importance. They should render to their *cestuis que trustent* the fullest accounts

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[1] *Re Tollemache*, *ante*, p. 120; *Re Morrison* (1901), 1 Ch., 701; 70 L. J., Ch., 399; 84 L. T., 383.

[2] 59 & 60 Vict., c. 35, sec. 3.

[3] As to the appointment of a judicial trustee under this Act, see *ante*, p. 73.

[4] See *Perrins* v. *Bellamy* (1899), 1 Ch., 797; 68 L. J., Ch., 397; 80 L. T., 478; 47 W. R., 417.

[5] *National Trustee Co. of Australasia* v. *General Finance Co.* (1905), A. C., 373; 74 L. J., P. C., 73; 92 L. T., 736.

[6] *Re Turner*, *Barker* v. *Ivimey* (1897), 1 Ch., 536; 66 L. J., Ch., 282; 76 L. T., 116; *Re Grindley*, *Clews* v. *Grindley* (1898), 2 Ch., 593; 67 L. J., Ch., 624; 79 L. T., 105; 47 W. R., 53.

and information, and having done this they are entitled to demand a proper release. When a *cestui que trust* is *sui juris*, and is absolutely entitled, and has created no charge or incumbrance upon the property, he is entitled to have the trust property handed over, and conveyed to, and vested in him.

Trustee Act 1893, and Judicial Trustees Act 1896, set out in Appendix.

In this chapter considerable reference has been made to the Trustee Act 1893, which is a statute of a consolidating nature with regard to the position, powers, and duties of trustees. This statute is of such importance that it has been thought advisable to set it out in full in the Appendix, and students, having first perused this chapter, are recommended to also go through, and thoroughly study, the Act of Parliament itself. The Judicial Trustees Act 1896 will also be found set out in the Appendix, together with an epitome of the rules thereunder.

CHAPTER III.

OF THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS.

General points.

On the decease of any person the first enquiry to be made is, naturally, whether he has died testate or intestate; and then, if testate, it is necessary to prove his will, and if intestate, to obtain a grant of letters of administration. The executor, or administrator, has then the important duty cast upon him of properly administering or applying the estate of the deceased. Until lately his duties only extended to the personal estate, and he had nothing to do with the realty except, as regarded an executor, in two cases, viz.: (1) where he was also a trustee of it, and (2) where the real estate was by the will charged with payment of debts, and there was no express provision made as to who was to have the power of sale, and the property was not devised to trustees for the whole of the testator's estate or interest therein. In this case, under the Law of Property Act 1859 [1] the executor [2] had a power of sale for the purpose of raising the money to pay the testator's debts. Now, however, as regards deaths occurring on or after 1st January 1898, by reason of the provisions contained in the Land Transfer Act 1897, the executor or administrator is concerned also with the realty, other than copyholds. This statute enacts that where real estate (other than copyholds) is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition,

Land Transfer Act 1897, Part I.

[1] 22 & 23 Vict., c. 35, sec. 16 (Lord St. Leonard's Act).

[2] This provision did not apply to an administrator with the will annexed (*Re Clay & Tetley*, 16 Ch. D., 3; 43 L. T., 403).

devolve to and become vested in his personal representatives, from time to time, as if it were a chattel real; and that all enactments and rules of law in respect of matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to such real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate. Subject to this, the personal representatives are to hold the real estate as trustees for the persons beneficially entitled thereto, who may in due course require and compel transfer to them. And these provisions also apply to and include all real estate over which the will of a deceased person executes a general power of appointment.[1]

Comments on this enactment.

This is certainly a very important enactment; it appears to apply to every kind of property which is generally recognised amongst lawyers as real estate, *e.g.*, manors, advowsons, tithes, easements, and other incorporeal hereditaments.[2] There must, however, be no right in any other person by way of survivorship. It appears only to include property which remains part of the deceased's estate after his death, *e.g.*, not estates for the deceased's own life, or estates tail, or joint tenancies. It does include equitable interests in copyholds, but not copyholds to which the deceased had actually been admitted tenant.[3]

[1] 60 & 61 Vict., c. 65, Part I., secs. 1-3. Nothing in this Act is to alter the order in which real and personal assets are applied for funeral and testamentary expenses, debts, and legacies, sec. 2 (3); see hereon, *post*, pp. 144-152.

[2] Robbins & Maw's Devolution of Realty and Administration of Assets, 47.

[3] *Re Somerville & Turner* (1903), 2 Ch., 583; 72 L. J., Ch., 727; 89 L. T., 405.

It will be observed that one of several personal representatives cannot, without the authority of the Court, sell or transfer real estate, and on this it has been held that if there are two executors, and one only obtains a grant of probate, but the other has not renounced, the one who has proved cannot by himself make a title.[1]

Re Pawley & London & Provincial Bank.

Executor's duties.

The executor or administrator proceeds to acquaint himself with all details relating to the deceased's estate, getting it in, and generally exercising all proper controlling powers, bearing in mind that he is now the person responsible. The personal representative is allowed one year from the death within which to fully inform himself as to the state of the property, and ascertain the amount of debts and of assets; and during this period, commonly called the executor's year, no legatee can compel payment of his legacy,[2] though there is nothing to prevent legacies being paid within the year if the circumstances of the estate warrant it.[3] But the personal representative should not, if it can be avoided, so extend the period of his administration, but should use all reasonable expedition. He should press for the payment of outstanding debts, and if his demand is not complied with in a reasonable time, he should enforce payment by legal proceedings, and his only excuse for neglecting to take such proceedings is a well-founded belief that such action would be useless, and the burden of proving that such belief was well founded is on him.[4] If through his neglect a debt is lost, he is guilty of a *devastavit*.

Executor's year.

Suing for outstanding debts.

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[1] *Re Pawley & London & Provincial Bank* (1900), 1 Ch., 58; 69 L. J., Ch., 6; 81 L. T., 507; 48 W. R., 107.

[2] *Benson* v. *Maude*, 6 Madd., 15; Williams on Executors, 1114, 1115.

[3] *Gorthshore* v. *Chalie*, 10 Ves., 13; *Pearson* v. *Pearson*, 1 Sch. & Lef., 12.

[4] *Re Brogden, Billing* v. *Brogden*, 38 Ch. D., 546; 59 L. T., 650; 37 W. R., 84; *Re Roberts, Knight* v. *Roberts*, 76 L. T., 479.

Executor carrying on testator's business.

An executor or administrator is ordinarily only justified in carrying on his testator's business so far as may be necessary for realization thereof; thus he is not bound to close the business immediately, but he may keep it on for a reasonable time, and endeavour to sell it as a going concern. Where the testator's will expressly or impliedly authorises the carrying on of the business it is, however, different, for the executor is entitled then to carry it on, and to be duly indemnified out of the estate; but where the testator has only authorised a certain portion of his estate to be devoted to the business, the executor's right of indemnity will only extend to such portion of the estate. And this right of indemnity is subject to the rights of all persons who were creditors of the testator at the time of his death, unless, indeed, they have assented to the business being carried on, in which case the executors are entitled to indemnity even against them.[1] The executors, whilst carrying on the business of their testator, are liable personally[2] to creditors, unless such creditors have agreed to look only to the testator's estate; and it makes no difference that they carry it on avowedly as executors.[3] But if it was proper for the executors to carry on the business, then if the creditors prefer to go against the estate instead of against the executors, there is nothing to prevent them doing so as against assets acquired since the testator's death, or against the assets of the testator which were existing at his death and which were lawfully employed in carrying on the business, subject, however, as regards these, to the rights of creditors of the testator.[4] A further

Re Gorton, Dowse v. *Gorton.*

[1] *Re Gorton, Dowse* v. *Gorton* (1891), A. C., 190; 60 L. J., Ch., 745; 64 L. T., 809; *Re Millard, Ex parte Yates*, 72 L. T., 823.

[2] *Ex parte Garland*, 10 Ves., 119; *Wightman* v. *Townroe*, 1 M. & S., 412; *Re Evans*, 34 Ch. D., 597; 56 L. T., 768; 35 W. R., 586.

[3] *Labouchere* v. *Tupper*, 11 Moo. P. C., 198.

[4] *Re Gorton*, and *Re Millard*, *supra; Re Raybould* (1900), 1 Ch., 199; 69 L. J., Ch., 249; 82 L. T., 46.

limitation also exists on this right of the creditors to go in a direct way against the assets of the testator authorised to be employed in the business, and that is, that if the executor is himself indebted to the estate, as he could not get indemnity without making good his default, the creditors are in no better position, and are, therefore, not entitled to have their debts paid out of the estate unless the default is first made good.[1] But where there are several executors or trustees, and one only is in default to the estate and the others are not responsible for his default, the creditors of the business are subrogated to the rights of the innocent executors or trustees, and may claim the benefit of their right to indemnity.[2]

Re Johnson, Shearman v. *Robinson.*

As to the liabilities of the deceased, the executor or administrator must be careful to ascertain them, and if he distributes the estate without either having it administered by the Court, or advertising for creditors under the Law of Property Amendment Act 1859, as presently mentioned, he will be personally liable to the extent of the assets for any legal claims that may afterwards be made. It is, therefore, very common for an executor or administrator to take advantage of the Law of Property Amendment Act 1859,[3] which provides that where he shall have advertised in the same way as would be done by the Court in an administration suit,[4] for creditors and others to come in and prove their claims, he may, at the expiration of the period named in such advertisements, distribute the assets, having regard only to the claims of which he then

Liabilities of deceased.

Advertising for creditors.

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[1] *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D., 548; 49 L. J., Ch., 745; 43 L. T., 372.

[2] *Re Frith, Newton* v. *Rolfe* (1902), 1 Ch., 342; 71 L. J., Ch., 199; 86 L. T., 212.

[3] 22 & 23 Vict., c. 35, sec. 29 (Lord St. Leonard's Act).

[4] See Indermaur's Manual of Practice, 255, and see hereon *Re Bracken, Doughty* v. *Townson*, 43 Ch. D., 1; 59 L. J., Ch., 18; 61 L. T., 531.

has notice, and shall not afterwards be liable to other creditors or claimants. This enactment goes on to provide that this shall not prejudice the rights of such other creditor, or claimant, to follow the assets into the hands of the persons who may have received the same. This provision applies to claims by next-of-kin as well as to claims by creditors, and affords protection to the sureties in an administration bond, where the administrator has pursued the course prescribed.[1] With regard to realty, which, as before stated, now passes to the personal representatives by virtue of the Land Transfer Act 1897, it has been held that if the personal representatives have so advertised for creditors, and they then assent to a devise, or convey to the heir, there is no right on the part of creditors of whose claims the personal representatives had no notice when they so assented or conveyed, to follow the real estate into the hands of a purchaser from the devisee, or heir, and require payment thereout.[2]

Re Cary & Lott.

The Law of Property Amendment Act 1859[3] also provides that where a personal representative, liable as such to the rent and covenants in any lease vested in the deceased, has satisfied all current liabilities under the lease, and has set aside any fixed sum which the lessee has agreed to lay out at a future date, and has assigned the lease to a purchaser, he may distribute the estate without personal liability for future claims, but the lessor may follow the assets. And the Act contains a like provision with regard to the rent and covenants in any conveyance on chief rent or rentcharge.[4] The personal repre-

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[1] *Newton* v. *Sherry*, 1 C. P. D., 246; 45 L. J., C. P., 257.
[2] *Re Cary & Lott's Contract* (1901), 2 Ch., 463; 70 L. J., Ch. 53; 84 L. T., 859.
[3] 22 & 23 Vict., c. 35, sec. 27.
[4] Sec. 28.

sentative of a lessee is liable for payment of rent and performance of covenants, after the death, to the extent of the assets only if he does not enter and take possession. But if he enters and takes possession, he becomes liable personally as assignee, though even then he may by proper pleading limit his liability for the rent (but not on the repairing covenants) to the actual letting value of the property.[1]

Executor compounding debts, &c.

By the Trustee Act 1893,[2] it is provided that an executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient; and that he may, if he thinks fit, accept any composition or security for any debt, and may allow time for payment thereof; and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing relating to the deceased's estate; and may do such things as may be expedient for those purposes without being responsible for any loss occasioned by anything so done by him in good faith. This provision applies to executorships and administratorships constituted or created either before or after the commencement of the Act; but it only applies so far as a contrary intention is not expressed. It may be observed generally that the powers of executors[3] or administrators,[3] in respect of administration of the effects, are joint and several,[4] so that if there are several executors one can act without the other,[5] and

Executors' powers are joint and several.

[1] *Re Bowes, Strathmore* v. *Vane*, 37 Ch. D., 128; 57 L. J., Ch., 455; 58 L. T., 309; *Rendall* v. *Andreae*, 61 L. J., Q. B., 630.

[2] 56 & 57 Vict., c. 53, sec. 21, which repeals and replaces 44 & 45 Vict., c. 41, sec. 37.

[3] See Williams on Executors, 715-720.

[4] See, however, as to realty under the Land Transfer Act 1897, *ante*, pp. 123, 124.

[5] See *Re Macdonald, Dick* v. *Fraser* ((1897), 2 Ch., 181; 66 L. J., Ch., 630; 76 L. T., 713), where one of three executors gave an acknowledgment of a debt which would but for it have been statute barred, and it was held that the acknowledgment revived the debt, which could by reason of it be claimed against the testator's estate.

therefore, if several executors join in giving a receipt, there is a presumption that each has received, and is responsible for, the money, though that presumption is capable of being rebutted[1]; but no such presumption arises in the case of trustees, by reason merely of their having joined in giving a receipt, for their powers are joint only. Further, the Trustee Act 1893[2] expressly provides that a trustee shall be chargeable only with moneys and securities actually received by him, notwithstanding his signing any receipt only for conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults. The same Act[3] also provides that where a power or trust is vested in two or more trustees (which expression includes executors and administrators[4]) jointly, then, unless the contrary is expressed, it may be exercised or performed by the survivor or survivors. This provision, however, only applies as regards trusts constituted or coming into operation after 31st December 1881.

Trustee Act 1893.

There are, as is presently pointed out,[5] certain priorities to be observed in the payment of the debts of a deceased person in the administration of an estate by the Court. And these priorities must be observed by an executor or administrator, for if he pays creditors of a lower degree first, he must, on deficiency of assets, answer those of a higher degree out of his own estate; and he is bound to plead a debt of a higher nature in bar of an action brought against him for a debt of inferior degree if he has not assets available for both, otherwise it will be an

Executor must observe priorities.

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[1] *Brice* v. *Stokes*, 2 Wh. & Tu., 633, and notes.
[2] 56 & 57 Vict., c. 53, sec. 24.
[3] Sec. 22, in substitution for the repealed provision of 44 & 45 Vict., c. 41, sec. 38.
[4] 56 & 57 Vict., c. 53, sec. 50.
[5] *Post*, pp. 144-152.

admission of assets sufficient to satisfy both debts.[1] But there is nothing to prevent an executor or administrator paying one creditor before another of the same degree; and this is so even although an action has been commenced by a creditor against the executor or administrator for the purpose of recovering his debt, though the power to prefer is taken away by a judgment, or by appointment of a receiver.[2] With regard to specialty and simple contract creditors, although it is provided by the Administration of Estates Act 1869[3] that "all creditors, as well specialty as simple contract, shall be treated as standing in equal degree and be paid accordingly," yet an executor or administrator must not pay a simple contract debt in priority to a specialty debt when the estate turns out to be insolvent.[4] An executor or administrator is justified in even paying a debt barred by the Statute of Limitations. But this right is strictly limited, and it does not permit an executor or administrator to pay or set off a debt which has been judicially declared barred by the Statute of Limitations,[5] or a debt or claim against his deceased's estate, arising under a contract which is not actionable, because it is not in signed writing as required for that contract by the Statute of Frauds.[6] The right of an executor or administrator to prefer one creditor to another, and to pay statute-barred debts, is taken away when there has been a judgment for administration by the Court, or even before then by the appoint-

But an executor may prefer one creditor to another of the same degree.

Re Hankey.

Executors may pay a statute-barred debt.

Re Rownson.

But not after judgment for administration.

[1] Williams on Executors, 753.

[2] *Vibart* v. *Coles*, 24 Q. B. D., 364; 59 L. J., Q. B., 152; 62 L. T., 551.

[3] 32 & 33 Vict., c. 46.

[4] *Re Hankey*, *Smith* v. *Hankey* (1899), 1 Ch., 541; 68 L. J., Ch., 242; 80 L. T., 47; 47 W. R., 444, where the case of *Re Ormond*, *Drury* v. *Ormond* (58 L. T., 24), deciding the contrary was not followed.

[5] *Midgley* v. *Midgley* (1893), 3 Ch., 282; 62 L. J., Ch., 905; 69 L. T., 241.

[6] *Re Rownson*, *Field* v. *White*, 28 Ch. D., 358; 54 L. J., Ch., 950; 52 L. T., 825; *Re Wheeler*, *Hankinson* v. *Hayter* (1904), 2 Ch., 66; 73 L. J., Ch., 576; 91 L. T., 227.

ment of a receiver. But it is not taken away by the mere institution of administration proceedings, nor by an order for accounts under Order XV.[1]; and it has been held that a plaintiff in a creditor's administration suit is not entitled, before judgment, to obtain the appointment of a receiver merely for the purpose of preventing the executor or administrator exercising his right of preference.[2]

Retainer by executor.

With regard to any debt which may be owing by the deceased to the executor personally,[3] he has always his right of retainer, which he may exercise out of moneys in his hands, or he may even exercise it as regards assets, other than cash, by retaining them *in specie*.[4] This right is said to have arisen from the executor's inability to sue himself,[5] and it exists even in respect of a debt barred by the Statute of Limitations.[6] The same reasoning gives an administrator an equal right of retainer, but it is now the practice of the Court to require any creditor administrator, before taking administration, to enter into a bond with two sureties, in which it is provided that he shall not prefer himself.[7] This, therefore,

Retainer by administrator.

[1] *Re Barratt*, *Whitaker* v. *Barratt*, 43 Ch. D., 70; 59 L. J., Ch., 218; 38 W. R., 59. See as to Order XV., Indermaur's Manual of Practice, 275-277.

[2] *Re Harris*, *Harris* v. *Harris*, 56 L. J., Ch., 754; 56 L. T., 507; 35 W. R., 710.

[3] See *Re Richards*, *Lawson* v. *Harvey* (1901), 2 Ch., 399; 70 L. J., Ch., 699. The executor is bound to exercise any right of retainer he may have as representative of another estate (*Fox* v. *Garrett*, 28 Beav., 16, but see *Re Ridley* (1904), 2 Ch., 774) at all events on request of the beneficiaries in such other estate (*Re Benett*, *Ward* v. *Benett*, 92 L. T., 593).

[4] *Re Gilbert* (1898), 1 Q. B., 282; 67 L. J., Q. B., 229; 77 L. T., 775.

[5] *Walters* v. *Walters*, 18 Ch. D., 182; 50 L. J., Ch., 819; 44 L. T., 769.

[6] *Trevor* v. *Hutchins* (1896), 1 Ch., 844; 65 L. J., Ch., 738; 74 L. T., 470.

[7] In *Davies* v. *Parry* (1899), 1 Ch., 602; 68 L. J., Ch., 346; 47 W. R., 429, it was decided that the form of bond then in use did not produce this result, but the form has since been altered. See also *Re Belham* (1901), 2 Ch., 52; 70 L. J., Ch., 474; 84 L. T., 440; 49 W. R., 498.

deprives him of any right of retainer; but if administration is granted to a person as next-of-kin, and there happens to be a debt owing to him, then he, not having given a bond in these terms, has the same right of retainer as an executor.[1] This right of retainer exists only out of strictly legal assets; and notwithstanding the Land Transfer Act 1897, there is no right to retain out of real estate.[2] It is allowed only as against creditors of equal degree,[3] and is a right not to be extended, so that, although now by the Administration of Estates Act 1869,[4] specialty and simple contract creditors rank equally, yet if the executor is a simple contract creditor, he cannot retain against a specialty creditor.[5] The right is not, however, lost by judgment in an administration action, even though the money may be in Court,[6] nor by an order for administration in bankruptcy being made under section 125 of the Bankruptcy Act 1883.[7] If, however, in an administration suit the Court appoints a receiver, then the right is lost as regards any moneys coming to the hands of such receiver, or of the executor, after the receiver's appointment. The reason of this is because the appointment of a receiver could only take place with the executor's consent, or in consequence of his misconduct,[8] for the Court will not interfere with an executor's right of retainer

Re Williams.

Walters v. *Walters.*

[1] *Re Beeman, Fowler* v. *James* (1896), 1 Ch., 48; 65 L. J., Ch., 190; 73 L. T., 555.

[2] *Re Williams, Holder* v. *Williams* (1904), 1 Ch., 52; 73 L. J., Ch., 82; 89 L. T., 580.

[3] See *Re Briggs, Earp* v. *Briggs*, W. N. (1894), p. 162; *Law Students' Journal*, 1894, p. 189; for a practical illustration.

[4] 32 & 33 Vict., c. 46.

[5] *Walters* v. *Walters*, 18 Ch. D., 182; 50 L. J., Ch., 819; 44 L. T., 769; *Wilson* v. *Coxwell*, 23 Ch. D., 764; 52 L. J., Ch., 976.

[6] *Nunn* v. *Barlow*, 1 S. & S., 588; *Ex parte Campbell, Campbell* v. *Campbell*, 16 Ch. D., 198; *Richmond* v. *White*, 12 Ch. D., 361; 48 L. J., Ch., 798.

[7] *Re Rhoades* (1899), 2 Q. B., 347; 68 L. J., Q. B., 804; 80 L. T., 742; 47 W. R., 561. As to this, see *post*, pp. 150-152.

[8] *Re Jones, Calvert* v. *Laxton*, 31 Ch. D., 440; 55 L. J., Ch., 350; 53 L. T., 855.

by appointing a receiver in an administration suit merely because the executor will probably exercise his right to the prejudice of the general body of creditors.[1]

Executors' procedure.

An executor should first pay the reasonable and proper funeral expenses of his testator,[2] and then all debts in the order presently mentioned, and next proceed to pay the various legacies,[3] bearing in mind the rules as to lapse, ademption, and priority respectively.

Legacies.

Legacies may be general, specific, or demonstrative. A general legacy is one given out of testator's estate generally, and not comprising any specific portion of it, *e.g.*, "I give £100 to A." A specific legacy is a gift of some special portion of the testator's estate, *e.g.*, "I give my diamond ring to A." A demonstrative[4] legacy is a gift of a general nature, but payable primarily out of some special portion of the testator's estate, *e.g.*, "I give £100 to A, payable out of my £500 consols." By a lapse is meant the failure of a gift made by will owing to the death of the legatee during the testator's lifetime.[5] By ademption is meant the failure of a specific legacy or devise because the testator does not own the subject matter thereof at his death. As to the priorities of legacies, specific

Lapse.

Ademption.

[1] *Re Wells*, *Molony* v. *Brooke*, 45 Ch. D., 569; 59 L. J., Ch., 810; 63 L. T., 521.

[2] Williams on Executors, 739. This does not include mourning for testator's widow and family (*Re Owens*, *Owens* v. *Green*, 87 *Law Times Newspaper*, 113).

[3] An executor may set off a debt owing by a legatee against a pecuniary legacy, whether general or specific, but not against a specific devise, or bequest of leaseholds, or of chattels (*Re Taylor*, *Taylor* v. *Wade* (1894), 1 Ch., 671; 63 L. J., Ch., 424; 70 L. T., 556); even though the debt is barred by the Statute of Limitations (*Dingle* v. *Coppen* (1899), 1 Ch., 726; 60 L. J., Ch., 337; 74 L. T., 693).

[4] Williams on Executors, 913.

[5] See 1 Vict., c. 26, secs. 32, 33, providing that there shall be no lapse in two cases; and Indermaur & Thwaites' Conveyancing, 535-539.

legacies must, of course, be paid so long as the specific property is existing and is not required to pay debts, and this rule also applies to demonstrative legacies whilst the fund exists which is demonstrated or pointed out for payment. General legacies are naturally paid rateably, and, if there is an insufficiency of assets, they abate or fail in proportion, and this is so also with regard to demonstrative legacies when the primary fund has ceased to exist. A specific legacy is said to possess the disadvantage of being liable to ademption; a general legacy is said to possess the disadvantage of being liable to abatement; but a demonstrative legacy possesses the advantages of both, in that, whilst it has priority if the particular fund exists, yet if such fund does not any longer exist, there is no ademption, but it is paid as a general legacy.

Abatement.

A legacy may be either vested, that is one which will be paid in all events, even though the time of payment is postponed; or contingent, that is one which will not be paid unless a certain contingency happens.[1] If a legacy, payable only out of personal estate, is bequeathed to an infant "payable" or "to be paid" at the age of 21 years, it is a vested legacy, the time of payment only being postponed, so that it will go to the personal representatives of the infant if he dies before that age. If, however, a legacy is bequeathed to an infant "at" 21 or "if" or "when" he shall attain the age of 21, this is on a contingency, and if the legatee dies before the appointed age the legacy fails, and does not go to his personal representatives, unless interest is given in the meantime, when it is otherwise.[2] In considering this subject, it must, however, be borne

Vested and contingent legacies.

[1] Tudor's Lead. C. Convyng., 449.

[2] *Stapleton* v. *Cheales*, Tudor's Lead. C. Convyg., 438; *Hanson* v. *Graham*, *Ibid.*, 440; *Re Jobson*, *Jobson* v. *Richardson*, 44 Ch. D., 154; 59 L. J., Ch., 245; 62 L. T., 148.

Distinction between purely personal legacies, and legacies charged on land.

in mind that there is an important difference between purely personal legacies, and legacies which are charged on real estate—a difference which is accounted for by the fact that in deciding on the validity and interpretation of purely personal legacies the Courts in general follow the rules of the Civil Law, as they were recognised and acted on in the Ecclesiastical Courts which had jurisdiction over such matters; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the Common Law. As regards legacies charged on land, therefore, and payable *in futuro*, although they may be said to be vested in one sense, yet the rule is that if the postponement is with reference to some event personal to the legatee, then, if that event never happens, the legacy is not to be raised out of the land. Thus take two cases of legacies charged on land and both payable *in futuro*: (1) Legacy to be raised and paid to A out of Whiteacre on A's attaining 21; (2) Legacy to A to be raised and paid out of Whiteacre on the death of B, to whom Whiteacre is devised for life. The payment of the legacy is postponed in the first case from regard to a circumstance personal to the legatee, and if he dies before 21, it will not be raised and paid, but will sink into the land for the benefit of the inheritance. But in the second case the postponement has regard to the circumstances of the estate, and it is considered that the testator meant it to be raised and paid in all events on the death of the tenant for life, though A might be then dead.[1]

The rule in *Saunders* v. *Vautier*.

When there is an absolute vested gift of a legacy, payable at a future time, the Court will not enforce a direction to meantime accumulate the income and

[1] *King* v. *Withers*, Ca. temp. Talb., 116; Williams on Executors, 999-1003; Prideaux's Conveyancing, Vol. II., 569-572.

pay it with the principal. Thus in *Saunders* v. *Vautier*,[1] a testator bequeathed all his East India stock in trust to accumulate the dividends until V attained 25, and then to transfer the stock and accumulations to V absolutely; and it was held that V took an immediate vested interest at the death, although he was then an infant, and that he could insist upon the stock and all accumulations being transferred to him as soon as he attained 21.

Expressing motive of bequest does not render it contingent.

The fact that a legacy is given for some particular purpose does not render it contingent and prevent the legatee or his representatives receiving it, if that object cannot be accomplished; for the expressing the purpose only shows the motive which led the testator to make the bequest, and is mere surplusage. Thus, if a legacy is given to an infant to apprentice him, and he dies before he is apprenticed, his representatives will still get the legacy.[2] In one case a testator gave money to trustees upon trust to spend the same in planting trees upon a settled estate. It was proved that, from the position and natural character of the property, it could not be planted with trees with profit or advantage; and it was held that the gift was intended for the benefit of the owners of the estate, and that the persons absolutely entitled thereto were entitled also to the money free from any condition.[3]

Re Bowes.

Interest on legacies.

In the absence of any direction on the point, the general rule is, that legacies carry interest at the rate of 4 per cent.[4] per annum after the end of one

[1] 1 Cr. & Ph., 240; *Wharton* v. *Masterman* (1895), A. C., 186; 64 L. J., Ch., 369; 72 L. T., 481.

[2] Smith's Manual, 93.

[3] *Re Bowes, Earl of Strathmore* v. *Vane* (1896), 1 Ch., 507; 65 L. J., Ch., 298; 74 L. T., 16.

[4] This is not affected by the decision in *Rowlls* v. *Bebb* (1900), 2 Ch., 107, *ante*, p. 99; see judgment of Lord Justice Lindley in that case.

year from the testator's death. But in the following cases they carry interest from the date of the testator's death, viz.: (1) A legacy charged on land; (2) A legacy to a child or person towards whom the testator has placed himself in *loco parentis*, when there is no provision in the will for such person's maintenance during infancy; (3) A legacy given in satisfaction of a debt, which debt itself bore interest; and (4) A specific legacy, and also a demonstrative legacy so long as it remains specific, carry with them their interest or profits from the date of the death.[1]

Appropriation of legacies.

By the Land Transfer Act 1897,[2] the personal representatives of a deceased person may, unless his will expressly provides the contrary, with the consent of any legatee or of any person entitled to a share in the residuary estate, appropriate any part of the residuary estate in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions all or any part of deceased's property in such manner as they may think fit; but before such appropriation is effectual notice must be given to all persons interested in the residue, and any of them may within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive unless the Court orders otherwise. If such an appropriation is made, or if the will expressly empowers the executors to appropriate without consent and they do so *bonâ fide*, any loss or increment in value of the appropriated funds is borne by or belongs to the legatee. But where a contingent legacy of cash is given, the loss from any appropriation by the executor would not fall on the legatee,[3] unless the appropriation is

[1] Williams on Executors, 1162-1172.
[2] 60 & 61 Vict., c. 65, sec. 4.
[3] *Allhusen* v. *Whittell*, L. R., 4 Eq., 295; 36 L. J., Ch., 929; *Re Hall* (1903), 2 Ch., 226; 72 L. J., Ch., 554.

made under the Act. The Act does not appear to have interfered with the power of the executors or the Court to appropriate a sum of money to answer a legacy which is vested, but payable at a future time and is not charged on land, or a legacy to a person who for some reason cannot be found, or a contingent legacy which carries intermediate income, or a legacy settled on trusts.[1]

Donatio mortis causâ.

It is sometimes necessary for an executor or administrator to consider his position with regard to a *donatio mortis causâ*, which may have been made by the deceased. A *donatio mortis causâ* is a gift of personal property made by a person who apprehends that he is in peril of death at the time, and is evidenced by a delivery of the property, or the means of obtaining the possession thereof, to the donee, and a condition accompanies the gift that it is revocable at pleasure, and it is necessarily revoked if the donor recovers. Delivery, words of gift, an expectation of death, and an intention on the part of the donor that the chattel shall revert to him in case of his recovery, are therefore the essential features of a *donatio mortis causâ;* but just as in an ordinary gift, the delivery may precede, or be contemporaneous with, or may follow, the words of gift.[2] A delivery to a bailee for the donee is sufficient, but a delivery to an agent of the donor with directions to deliver to the donee after the death of the donor will not do.[3] A *donatio mortis causâ* possesses some of the elements of a gift *inter vivos*, and some of the elements of a bequest. True, it vests in the donee, quite irrespective of the executor, by the delivery in the deceased's lifetime, and technically no assent on

Essentials.

Cain v. *Moon.*

Partly resembles a gift *inter vivos* and partly legacy.

[1] *Allhusen* v. *Whittell*, L. R., 4 Eq., 295; 36 L. J., Ch., 929; *Re Hall* (1903), 2 Ch., 226; 72 L. J., Ch., 554.

[2] *Cain* v. *Moon* (1906), 2 Q. B., 283; 65 L. J., Q. B., 587; 74 L. T., 728.

[3] Goodeve's Personal Property, 92.

the executor's part is required to perfect the donee's title, so that to this extent it resembles a gift *inter vivos*. But, on the other hand, it is revocable, it is liable to both estate and legacy duty, and it is subject to the debts of the donor if there is not otherwise a sufficiency of assets, so that for such a purpose it may be the executor's or administrator's duty to claim the *donatio* back from the donee. Again, it may be an imperfect, and therefore ineffective, *donatio*,[1] or it may be of property not capable of being made the subject of such a gift. Thus a railway certificate,[2] or a certificate for a share in a building society,[3] or a stock certificate,[4] cannot be given by way of a *donatio mortis causâ*; nor can the deceased's own cheque, unless cashed [5] or paid away for value [6] during his lifetime.[7] But the cheque of a third person payable to the deceased, or a promissory note, or bill of exchange, payable to him, may be given in this way, even although not endorsed by him [8]; and so may a banker's deposit note for money deposited at the bank by the donor,[9] and a post office savings bank deposit book,[10] and a mortgage,[11] an insurance policy,[12] and a bond.[13]

Satisfaction, Election, Performance, and Conversion.

Other matters, which it may be necessary for the

[1] See *Treasury Solicitor* v. *Lewis* (1900), 2 Ch., 812; 69 L. J., Ch., 833; 83 L. T., 139.
[2] *Moore* v. *Moore*, L. R., 18 Eq., 474.
[3] *Re Weston*, *Bartholomew* v. *Menzies* (1902), 1 Ch., 680; 71 L. J., Ch., 343; 86 L. T., 551.
[4] *Re Andrews* (1902), 2 Ch., 394; 71 L. J., Ch., 676; 87 L. T., 20.
[5] *Hewett* v. *Kay*, L. R., 6 Eq., 198; *Re Beaumont* (1902), 1 Ch., 889; 71 L. J., Ch., 478; 86 L. T., 410.
[6] *Rolls* v. *Pearce*, 5 Ch. D., 730; 46 L. J., Ch., 791.
[7] *Re Davis*, *Griffiths* v. *Davis*, 86 L. T., 889.
[8] *Clements* v. *Cheeseman*, 27 Ch. D., 631; 54 L. J., Ch., 158; 43 W. R., 40.
[9] *Re Dillon*, *Duffin* v. *Duffin*, 44 Ch. D., 76; 59 L. J., Ch., 420; 62 L. T., 614; *Re Mead*, *Austin* v. *Mead*, 15 Ch. D., 651; Brett's Eq. Cas., 31.
[10] *Re Weston*, *Bartholomew* v. *Menzies*, *supra*.
[11] *Duffield* v. *Hicks*, 1 Bligh, N. S., 498.
[12] *Witt* v. *Amis*, 1 Best & Sm., 109.
[13] See further as to a *donatio mortis causâ*, *Ward* v. *Turner*, 1 Wh. & Tu., 390, and notes.

executor or administrator to consider, are embraced in the doctrines of Election, Satisfaction, Performance and Conversion, matters which are dealt with hereafter.[1]

Property available for debts.

The property of a deceased person which can be made available to pay his debts is termed assets. If the creditor could reach the assets by action in a Court of Law, they were called legal assets[2]; but if the creditor could only reach them by a suit in Equity, they were called equitable assets.[3]

Legal assets.

Legal assets originally comprised all property which vests in the executor or administrator *virtute officii, i.e.*, all the deceased's personal estate of every description.[4] They also included, but only as regards debts of record and specialty debts created by deeds in which the heirs were expressly bound, legal estates in freeholds which descended to the heir; and this was extended to equitable estates which descended to the heir, by the Statute of Frauds,[5] and was further extended to devisees of a fee simple owner of freeholds[6]; and it was enacted that such creditors could sue the heir or devisee, if he alienated the land, in an action of debt to the value of such land.[7]

Equitable assets.

By a strange defect in English law, the simple contract creditors of a dead person had no means of getting paid out of the deceased's freeholds, and copyholds were not liable for any kind of debts. But it was open to a person to devise all or any part of his real estate for payment of his debts, or to

[1] See *post*, Part III., Chaps. 1, 2, and 3.
[2] *Cook* v. *Gregson*, 3 Drew, 547; *Shee* v. *French*, 26 L. J., Ch., 317.
[3] *Wilson* v. *Fielding*, 2 Vern., 763.
[4] *Cook* v. *Gregson*, 3 Drew, 547; *Bain* v. *Sadler*, L. R., 12 Eq., 570.
[5] 29 Car. II., c. 3, sec. 10.
[6] 3 & 4 Wm. & Mary, c. 14, extended by 1 Wm. IV., c. 47.
[7] 1 Wm. IV., c. 47, secs. 6, 8.

charge his real estate with payment of his debts, thereby constituting the same an ancillary fund applicable for the payment of his debts when the personal estate had been exhausted. When this was done, the real estate so devised or charged became equitable assets.[1] And the Court of Chancery laid it down that a mere general direction by a testator that his debts should be paid constituted a charge of such debts on his real estate[2]; though a direction that the executors should pay his debts only charged such realty as was devised to them,[3] and a direction to pay debts out of a specified part of the testator's realty would only bind that part. The Administration of Estates Act 1833[4] amended the hitherto defective rules of Law and Equity, by enacting that all the real estate of a deceased person (whether freehold, customaryhold, or copyhold), which is not by his will charged with or devised subject to payment of his debts, shall constitute assets to be administered in Equity for the payment of all his debts. This statute,[4] however, provided that creditors by specialty in which the heirs were bound should be paid in full out of such real estate in priority to creditors by simple contract or by specialty in which the heirs were not so bound. But this priority has been taken away by the Administration of Estates Act 1869,[5] which enacts that in the administration of the estate of every person who dies after 1st January, 1870, no debt shall be entitled to any priority or preference by reason merely that it is a specialty debt, but that specialty and simple contract creditors shall be

[1] *Silk* v. *Prime*, Dick, 384.

[2] *Corser* v. *Cartwright*, 7 H. L. Ca., 731.

[3] *Re Bailey*, 12 Ch. D., 268; *Re Tanqueray Willaume and Landau*, 20 Ch. D., 465.

[4] 3 & 4 Wm. IV., c. 104 (Lord Romilly's Act); *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D., 478; 53 L. J., Ch., 991; 51 L. T., 523.

[5] 32 & 33 Vict., c. 46 (Hinde Palmer's Act). It does not apply to Scotland.

treated as standing in equal degree, and be paid accordingly out of the deceased's assets whether legal or equitable, though without prejudice to any security which any creditor may hold.

Effect of Land Transfer Act.

It is necessary here to consider the effect of Part I. of the Land Transfer Act 1897[1] upon this subject. We have already seen[2] that on a death since 1897, this Act makes all real estate[3] which remains the property of the deceased after his death and real estate[3] over which his will exercises a general power of appointment, vest in his executors or administrators like chattels real; and that (with one exception as to conveying) all statutes and rules of law, in relation to the administration of personal estate, and the powers, duties, rights and liabilities of personal representatives in respect of personal estate, apply to such real estate. The Act further provides[4] that such real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate; but without altering the order in which real and personal assets were previously applicable in the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies. The effect of the Act appears to be[5] that all real estate (save certain copyholds) is made legal assets upon any death since 1897.

Differences between legal and equitable assets.

The original differences between legal and equitable assets were these: (1) The creditor could sue at Law in respect of legal assets, but only in Chancery,

[1] 60 & 61 Vict., c. 65, secs. 1-5.
[2] *Ante*, pp. 122-124.
[3] Except copyholds to which he had been admitted tenant on the court rolls.
[4] Section 2 (3).
[5] Williams on Executors, 1308. But see *contra*, Robbins & Maw, 124, 128, 160.

before the Judicature Acts, for equitable assets; (2) Debts were paid out of legal assets in a settled order of priority, but all debts ranked *pari passu* against equitable assets—a distinction which lost its chief practical importance when specialty and simple contract debts were made payable *pari passu* after 1869; (3) The right of retainer applied to all personal estate, but not to anything else; and (4) A creditor who got judgment against the executor or administrator thereby got priority over other creditors of the same class as regards personal estate. The right of retainer is still confined to personal estate.[1] But as regards real estate generally, the other points in which it differed from personal estate above mentioned, appear—though it is not free from doubt—to have been done away with by the provisions of the Land Transfer Act set out above. The copyholds exempted from this Act still remain equitable assets only. But as to other real property, it seems the creditor must now sue the executor or administrator, and that the devisee or heir cannot now be sued, to the value of the realty which has come to him, by a creditor, except (1) when the personal representatives have duly advertised for debts, and paid all of which they have notice, and then assented to the devise or conveyed to the devisee or heir, and some creditor afterwards comes forward, or (2) when the personal representatives have so assented, or conveyed, subject to a charge for the payment of any money which they know at the time they are liable to pay.

Order for payment of debts out of legal assets.

With regard to the payment of debts out of legal assets, the Court, in the administration of an estate, has always observed certain priorities, paying the debts in the following order :—

(1) Debts due to the Crown by record or specialty.

[1] *Ante*, p. 132.

(2) Debts preferred by particular statutes.[1]

(3) Judgment debts.[2]

(4) Debts due under recognizances, *e.g.*, from a receiver appointed by the Court.

(5) Specialty debts and arrears of rent.

(6) Simple contract debts, and unregistered judgments against the deceased, and also money due for dilapidations under the Ecclesiastical Dilapidations Act 1871.

(7) Voluntary bonds, unless assigned for value during the testator's lifetime, when they stand on the same footing as other specialty debts.[3] But as we have seen, the priority of specialty creditors was abolished by the Administration of Estates Act 1869[4] as to all deaths after 1st January, 1870, and, therefore, from that time those debts numbered "5" and "6" in the foregoing list have been paid rateably. But simple contract debts due to the Crown are to be paid in priority to other simple contract debts out of that rateable proportion of assets set aside for simple contract debts.[5]

Hinde Palmer's Act.

If any person dies insolvent—*i.e.*, is actually insolvent at the date of his death—then the personal representative must pay in full the rates and taxes and wages which would have priority if he were adjudged bankrupt, next after class 2 in the foregoing list.[6]

Preferential Payments in Bankruptcy Act 1888.

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[1] *E.g.*, a debt due to a registered friendly society from its officer for money of the society in his possession (59 & 60 Vict., c. 25, sec. 35); or to a building society by its officer (4 & 5 Wm. IV., c. 40); or to a parish by the overseers of the poor (17 Geo. II., c. 38, sec. 3).

[2] For this priority to exist in respect of a judgment debt against the deceased, registration of the judgment was formerly necessary, but this is no longer so as from 1st July, 1901, and a writ or order for the purpose of enforcing it must be registered instead, under sec. 5 of the Land Charges Act 1888 (see 63 & 64 Vict., c. 26, secs. 5, 6).

[3] Williams on Executors, 751-779.

[4] 32 & 33 Vict., c. 46.

[5] *Re Bentinck* (1897), 1 Ch., 673; 66 L. J., Ch., 359; 76 L. T., 284.

[6] 51 & 52 Vict., c. 62 (Preferential Payments in Bankruptcy Act 1888), sec. 1 (6); *Re Heywood* (1897) 2 Ch., 593; 67 L. J., Ch., 25; 77 L. T., 423.

Position as regards payment out of equitable assets.

With regard to equitable assets, the rule of the Court of Equity has always been different to the rule observed as regards priorities in payment out of legal assets. The general principle is, and always has been, that there shall be no priorities, a matter which has been well explained as follows:—"Equitable assets were, in their origin, a trust fund for the payment of debts, and, unlike legal assets, consisted of such property as it was equally within the power of the testator to apply toward, or withhold from, the payment of his debts by the personal representative. Being, therefore, a fund for participation in which creditors were dependent upon the bounty of the testator, the rule of equal distribution was adopted by Courts of Equity as being most in accordance with the presumed intention of the testator that all his debts should be paid."[1] However, with regard to creditors under voluntary bonds, the rule has always been that they must be paid last, even out of equitable assets.

The personal representative of a deceased must, therefore, in paying debts, consider whether the assets are legal or equitable, and observe the priorities in respect of legal assets, but pay all debts *pari passu* out of equitable assets, except voluntary bond debts. This is so equally whether the estate is solvent or insolvent, though of course in the former case the distinction is of no practical importance, as every one will be paid in full.

Provision of Judicature Act 1875, as to administration of insolvent estates by the Court.

If, however, the estate is an insolvent one, and is being *administered by the Court*, the position is now considerably different by reason of section 10 of the Judicature Act 1875,[2] which enacts that in the *administration by the Court* of the assets

[1] Robbins & Maw, 182.
[2] 38 & 39 Vict., c. 77.

of deceased persons whose estates prove insolvent, the same rules shall prevail and be observed—(1) as to the respective rights of secured and unsecured creditors, (2) as to debts and liabilities provable, and (3) as to the valuation of annuities, and future and contingent liabilities respectively—as may be in force for the time being under the law of bankruptcy with regard to the estates of persons adjudged bankrupt. Now, in bankruptcy, the rule has been, and is, that all debts (with some few exceptions, such as to some extent rates, taxes and wages[1]) are paid *pari passu*, a very different state of things to what existed in equity. So, also, there was a most important difference between the rules in equity and in bankruptcy regarding the position of a secured creditor. In equity, the secured creditor had always been entitled to rest upon his security, and, at the same time, prove against the general estate for his full debt, and receive dividends thereon, so only that he did not from the general estate and from his security receive more than 20s. in the £; whilst, in bankruptcy, the rule has always been that he must either relinquish his security, when he could prove for his whole debt, or realize his security and prove for the deficiency, or estimate his security at a certain amount and then prove for any deficiency.

Secured creditor's position.

The construction of this 10th section of the Judicature Act 1875 has proved a matter of great difficulty. On one point, however, its effect was clear, viz., that the position of a secured creditor claiming in equity against an insolvent estate was exactly assimilated to the position in bankruptcy. This must be carefully borne in mind. For a long time, however, the Courts declined to admit that

Effect of section 10 of Judicature Act 1875.

[1] 51 & 52 Vict., c. 62.

the real effect of the enactment was to assimilate the position generally to what it was in bankruptcy, and to do away with any priorities that did not there exist, and to make any postponements that were made there.[1] However, a different view gradually gained ground, and that this must now be taken to be the real meaning of the enactment is shown by the cases referred to in the next paragraph.

Re Leng, Tarn v. Emmerson.

In *Re Leng, Tarn* v. *Emmerson*,[2] the point involved was whether the provision of the Married Woman's Property Act 1882,[3] postponing the claim of a wife (who has advanced money to her husband for the purposes of his trade), as a creditor in case of his bankruptcy, to the claims of his other creditors, was to be treated as a rule of bankruptcy which is imported by section 10 of the Judicature Act 1875 into the case of the administration by the Court of the husband's assets, in the event of his estate proving insolvent after his death. The Court held that the bankruptcy rule did apply, and that the wife's claim was postponed. But if the wife had been the husband's executrix, neither statute takes away or prejudices her right to retain such a debt.[4] In *Re Whitaker, Whitaker* v. *Palmer*,[5] the point involved was whether a creditor claiming under a voluntary bond was, in proving against an insolvent estate being administered by the Court, postponed to other creditors. This, as has been pointed out, was always the equity rule, but there is not, and never has been, any such rule in bankruptcy, for there a creditor under a voluntary bond

Re Whitaker.

[1] See *Smith* v. *Morgan*, 5 C. P. D., 337; 49 L. J., Q. B., 410; *Re Maggi*, 20 Ch. D., 545; 51 L. J., Ch., 560; 46 L. T., 362.
[2] (1895), 1 Ch., 652; 64 L. J., Ch., 468; 72 L. T., 407.
[3] 45 & 46 Vict., c. 75, sec. 3.
[4] *Re Ambler, Woodhead* v. *Ambler* (1895), 1 Ch., 697; 74 L. J., Ch., 367; 92 L. T., 716.
[5] (1901), 1 Ch., 9; 70 L. J., Ch., 6; 83 L. T., 449; 49 W. R., 106. See further *Re McMurdo*, 71 L. J., Ch., 691.

ranks with other creditors. The Court held that the bankruptcy rule applied, and that he was not postponed. But section 10 does not take away the prerogative of the Crown to claim priority in front and outside of the administration.[1]

Practical result.

The practical result must be that, in considering the priorities and rights of creditors in the administration by the Chancery Division of the High Court of Justice, of an estate of a deceased person which proves insolvent, all the bankruptcy rules apply (except as to the Crown), and, that being so, in such a case the order for payment of debts stands as follows :—

1. Crown debts.

2. Any debt due to a registered Friendly Society from its officer for money of the Society in his possession.[2]

3. The debts to which preference is given by the Preferential Payments in Bankruptcy Act 1888—that is, rates, taxes and wages, as therein mentioned.[3]

4. The general debts, whether by judgment, recognizance, specialty, or simple contract, and this even though the debt is created by a voluntary bond.[4]

5. Debts specially postponed by statute, viz., money lent by a woman to her husband for the purposes of his business,[5] and also the two debts mentioned in section 3 of the Partnership Act 1890.[6]

Summary as to priorities.

We may now conveniently summarize the various positions as to priorities of debts :—

[1] *Re Oriental Bank*, 28 Ch. D., 643 ; 54 L. J., Ch., 327 ; 52 L. T., 170 ; *Re Churchill*, 39 Ch. D., 174 ; 58 L. J., Ch., 136 ; 59 L. T., 597.

[2] 59 & 60 Vict., c. 25, sec. 35.

[3] 51 & 52 Vict., c. 62 ; *Re Heywood* (1897), 2 Ch., 593 ; 67 L. J., Ch., 25 ; 77 L. T., 42.

[4] *Re Whitaker, Whitaker* v. *Palmer* (1901), 1 Ch., 9 ; 70 L. J., Ch., 6 ; 83 L. T., 449.

[5] 45 & 46 Vict., c. 75, sec. 3 ; *Re Leng, Tarn* v. *Emmerson* (1895), 1 Ch., 652 ; 64 L. J., Ch., 468 ; 72 L. T., 407.

[6] 53 & 54 Vict., c. 39. See this Act set out in Appendix, *post*.

1. Where the estate is solvent and is being administered either out of Court, or by the Court, if the assets are legal assets, the priorities to be observed are those detailed, *ante*, pp. 144, 145.

2. Where the estate is solvent and is being administered either out of Court, or by the Court, if the assets are equitable assets, all debts are paid *pari passu*, except that voluntary bonds are postponed.

3. If the deceased died insolvent and the estate is being administered out of Court, rates, taxes, and wages must be given priority, as set out on p. 145, *ante*.

4. Where the estate is insolvent and is being administered by the Court, then, whether the assets are legal or equitable, the bankruptcy rules prevail (except as to Crown debts), and the position is as set out on p. 149.

What bankruptcy rules do not apply.

It must, however, be observed in considering section 10 of the Judicature Act 1875, that it does not in any way affect the question of what are the assets to be administered. It does not import, into the administration by the Court of the insolvent estates of deceased persons, any rule of bankruptcy which, if adopted, would go to swell the assets. Thus, the provisions of the Bankruptcy Acts 1883 and 1890, restricting the rights of creditors under executions, the provisions avoiding certain voluntary settlements executed by the bankrupt, the reputed ownership clause, and the provisions as to fraudulent preferences, do not apply to the administration by the Court of the insolvent estates of deceased persons.[1]

Administration of the estate of a deceased insolvent in bankruptcy.

It must also be noticed that by the Bankruptcy Act 1883,[2] as amended by the Bankruptcy Act 1890,[3] any creditor of a deceased person whose debt would have

[1] Robbins & Maw, 225, 226.
[2] 46 & 47 Vict., c. 52, sec. 125.
[3] 53 & 54 Vict., c. 71, sec. 21.

been sufficient to support a bankruptcy petition against such debtor had he been alive—*i.e.*, if the debt is at least £50—may present to the Bankruptcy Court a petition praying for an order for the administration of the estate of the debtor according to the law of bankruptcy. The Court is not to make any such order unless satisfied that there is a reasonable probability that the estate will be insufficient for the payment of the debts owing by the deceased; but, upon the order being made, the property of the deceased person vests in the Official Receiver in Bankruptcy, who is to realize and distribute it in accordance with the provisions of Part III. of the Bankruptcy Act 1883, relating to the administration of the property of a bankrupt, except that the proper funeral and testamentary expenses incurred[1] are to be paid in full before all other debts. Beyond this, however, the whole of the bankruptcy rules prevail, so far as they can reasonably be applied. Thus debts are paid in the bankruptcy order, the landlord has the same right of distress as in bankruptcy, the bankruptcy rules of set-off apply, and the bankruptcy rules as to disclaimer of onerous property apply.[2] But the right of retainer is not taken away,[3] and the rules of bankruptcy do not apply as to discovery,[4] or relation back of the trustee's title, or reputed ownership, or restrictions on execution creditors, or avoiding voluntary settlements, or fraudulent preference.[5] It is also provided that if administration proceedings have been commenced in the Chancery Division of the High Court,

[1] These words have been held to extend to costs, charges and expenses of the legal personal representative properly incurred in an administration action (*Re York, Atkinson* v. *Powell*, 36 Ch. D., 233; 56 L. J., Ch., 552; 56 L. T., 704).

[2] *Re Mellison, Ex parte Day* (1906), 2 K. B., 68; 75 L. J., K. B., 595.

[3] *Re Rhoades* (1899), 2 Q. B., 347; 68 L. J., Q. B., 804; 80 L. T., 742.

[4] *Re Hewitt*, 15 Q. B. D., 159; 54 L. J., Q. B., 402; 53 L. T., 156.

[5] *Re Gould, Ex parte Official Receiver*, 19 Q. B. D., 92; 56 L. J., Q. B., 333; 56 L. T., 806.

such Division may, on proof that the estate is insufficient to pay the debts, transfer the proceedings to bankruptcy, and thereupon the Bankruptcy Court may make an order for administration, when the like consequences shall ensue as upon an administration order made on the petition of a creditor.[1] Having reference, however, to the construction that has now been put upon the provisions of section 10 of the Judicature Act 1875,[2] as to the administration of an insolvent estate in the Chancery Division, the subject of administration in bankruptcy under section 125 of the Bankruptcy Act 1883 does not seem of much importance, as almost the same results ensue whether it is administered in the Chancery Division or in bankruptcy, except that Crown debts lose their priority in bankruptcy. Applications for transfer from Chancery to Bankruptcy are frequently made.[3] The power of transfer is a discretionary one, and may be exercised notwithstanding judgment for administration has been pronounced in the Chancery Division; but it will not be exercised when the estate is small, the creditors are few, and considerable expense has already been incurred in the Chancery chambers in the proceedings under an administration judgment.[4] Generally the predominating considerations for the Court in determining whether a transfer shall be made or not, ought to be convenience, delay, and expense. The Court should have regard to the convenience of the creditors at large, and no great weight ought to be attached to the position of the particular creditor who applies for or opposes the transfer.[5]

No advantage in bankruptcy administration.

[1] 46 & 47 Vict., c. 52, sec. 125, sub-sec. 4, as amended by 53 & 54 Vict., c. 71, sec. 21.

[2] See *ante*, pp. 146-149, and the cases of *Re Leng*, *Tarn* v. *Emmerson*, and *Re Whitaker*, *Whitaker* v. *Palmer*, there quoted.

[3] Per Kekewich, J., in *Re Kenward*, 94 L. T., at p. 278.

[4] *Re Weaver*, *Higgs* v. *Weaver*, 29 Ch. D., 236; 54 L. J., Ch., 749; 52 L. T., 512.

[5] *Re York*, *Atkinson* v. *Powell*, 36 Ch. D., 233; 56 L. J., Ch., 552; 56 L. T., 704; *Re Baker*, *Nichols* v. *Baker*, 44 Ch. D., 262; 59 L. J., Ch., 661; 62 L. T., 817; *Re Kenward*, *Hammond* v. *Eade*, 94 L. T., 277.

Rights of beneficiaries.

An important point to be considered in the administration of an estate is that of the rights of the various beneficiaries as amongst themselves. If the assets are ample there is no difficulty; all the debts will be paid, and then, in their proper order, the beneficiaries. But it is manifest that, when the estate is insufficient to pay all the creditors, and also all the devisees and legatees, some of the beneficiaries must suffer, and the question then presents itself, as between the beneficiaries, what is the order in which the assets are to be applied for the payment of the deceased's debts? The shortest plan will be to first give a list comprising the general order in which the assets are to be applied, which is as follows:—

Order in which assets to be applied.

1. The general personal estate, or residuary personalty, unless exempted expressly or by plain implication.

2. Any estate particularly devised for payment of debts, and only for that purpose.

3. Real estate not charged with payment of debts, and which descends to the heir, or would do so but for the Land Transfer Act 1897.

4. Real or personal property charged with the payment of debts, and devised, or specifically bequeathed, subject to that charge.[1]

5. General pecuniary legacies *pro ratâ*,[2] including herein annuities, and also demonstrative legacies which have become general.[3]

[1] *Re Kempster* (1906), 1 Ch., 446; 75 L. J., Ch., 286; 94 L. T., 248.

[2] *Farquharson* v. *Floyer* (2 Ch. D., 109; 45 L. J., Ch., 750), where the case of *Hensman* v. *Fryer* (L. R., 3 Ch. Apps., 745; 37 L. J., Ch., 97), in so far as it decided that general pecuniary legatees stood in the same position as specific devisees and legatees, was not followed, and V. C. Hall said, "That decision has always been treated as a mistake."

[3] In *Re Bate*, *Bate* v. *Bate* (43 Ch. D., 600; 59 L. J., Ch., 277; 62 L. T., 559), Lord Justice (then Mr. Justice) Kay held that the assets above numbered 4 and 5 must be transposed; but this case has not been followed (see *Re Stokes*, *Parsons* v. *Miller*, 67 L. T., 223; *Re Salt*, *Brothwood* v. *Brothwood* (1895), 2 Ch., 203; *Re Roberts* (1902), 2 Ch., 834; 72 L. J., Ch., 38; 87 L. T., 523). The order as given above in the text is established by a long current of authorities, and must still be considered correct. In *Re Stokes*, Mr. Justice Stirling, speaking of *Re Bate*, and of its apparent departure from previous decisions, said, "I observe, first of all, that none of these cases were cited, and it could not have been the intention of the Lord Justice, I am quite sure, to in any way overrule the authorities to which I have referred."

6. Specific devises, residuary devises, and specific bequests not charged with debts.

7. Real and personal estate appointed by will under a general power of appointment; unless the power of appointment is over personal property, and it is exercised by a general or residuary clause without any special reference to the power, when it will be considered as forming part of the general personal estate.[1]

8. Paraphernalia of the widow of the deceased.[2]

9. Property comprised in a *donatio mortis causâ*.[3]

Reason for this order of the application of assets.

It should be observed that the whole reasoning in respect of the order in which assets are to be applied, as just mentioned, is a carrying out of the testator's intention. The general personal estate is deemed the natural and primary fund for payment of all debts, and the testator is presumed to act on this legal doctrine, unless he shows some other distinct and unequivocal intention to the contrary.[4] This seems very natural reasoning, for it is manifest that a man, when living, will pay his debts out of cash in his possession, rather than realize property to pay them, and, therefore, at his death, it is only in accordance with his probable desire, to pay his debts out of his general personal estate. But if the general personal estate is not sufficient, then again, it is only common sense to suppose that if the testator has taken the trouble to devise property for the payment of his debts, that is the property he would desire should next be resorted to. Failing that, it would seem to be in furtherance of the testator's intention that the heir, not being an object

[1] *Re Hartley, Williams* v. *Jones*, 69 L. J., Ch., 79; 81 L. T., 804; 48 W. R., 245.

[2] 1 Wh. & Tu., 32, 33.

[3] Williams on Executors, 600.

[4] Story, 377; *Duke of Ancaster* v. *Mayer*, 1 Wh. & Tu., 1; *Trott* v. *Buchanan*, 28 Ch. D., 446; 54 L. J., Ch., 678; Brett's Eq. Cas., 278.

of his bounty, but taking only by operation of the law, should be the person who should next suffer, and this line of argument is applicable throughout the whole order. Thus particularly also, when we come to general and specific legatees, it is manifest that the general legatees ought to lose the amount of their legacies, or suffer abatement, rather than the specific legatees, for the testator, in giving a specific legacy, must have meant the thing itself to pass unconditionally, and in *statu quo*, to the legatee, which could not be the case if it were subject to the payment of debts in the first instance.[1]

As to specific legatees, and devisees, and residuary devisees.

Special attention should be paid to the assets numbered "6" in the order given, for it is there stated that a specific legatee, or devisee, stands in exactly the same position as a residuary devisee, and at first sight this will probably strike the reader as not being just and right. Prior to the Wills Act 1837,[2] there could be no doubt that a residuary devisee stood in the same position as a specific devisee or legatee, for a will as to real property only spoke from the date of the making, and could only pass property which the testator then had. A residuary devisee was, therefore, then, substantially a specific devisee. The Wills Act 1837, however, made a will speak from the date of the death as regards all property, and it was then argued that as a residuary devisee might take other property than what the testator was possessed of at the time of making his will, he was not so much an object of the testator's bounty as a specific devisee or legatee; that the residuary devisee was in fact only a devisee of whatever might be left, and that, therefore, he should be liable to contribute rateably with pecuniary

Position prior to 1 Vict., c. 26

[1] *Robertson* v. *Broadbent*, 8 App. Ca., 812; 53 L. J., Ch., 266; 50 L. T., 243; 32 W. R., 205.
[2] 1 Vict., c. 26.

Residuary devise still in effect specific notwithstanding 1 Vict., c. 26.

legatees, that is, to be placed in the order numbered "5" in our list. After some contrary decisions it has, however, now been definitely decided that this is not the correct view; that though it is true the residuary devisee may take other property, yet it must always, in all probability, have been clear in the testator's mind what real estate he possessed, and that, therefore, in effect, a residuary devise remains at the present day just as much specific as it ever was.[1] This is only a further illustration of what has been already stated, viz., that the whole principle upon which the order of application of assets is founded, is the intention of the testator.

Lancefield v. *Iggulden.*

Exceptions to the rule that the general personal estate is the primary fund.

But although the general personal estate is the primary fund for payment of debts, yet there are various exceptions, and they may be stated to be as follows:—

1. Where the general personal estate is by express words exonerated, and postponed to some other asset.

2. Where it is exonerated and postponed, by the testator's manifest intention.

3. Where the debt is one in its nature real, *e.g.*, a jointure.

4. Where the debt was not contracted by the person whose estate is being administered, but by some one else from whom he took it.

5. Where the debt is a mortgage debt, or is a vendor's lien, or any other equitable charge on land.[2]

What will amount to an intention to exonerate the personalty.

The first of these exceptions needs no explanation, but with regard to the second the question must be considered, what will be sufficient evidence of intention to exonerate the general personal estate?

[1] *Hensman* v. *Fryer*, L. R., 3 Ch. Apps., 420; 37 L. J., Ch., 97; *Lancefield* v. *Iggulden*, 10 Ch. Apps., 136; 44 L. J., Ch., 203; *Farquharson* v. *Floyer*, 2 Ch. D., 109; 45 L. J., Ch., 750.

[2] 1 Wh. & Tu., 12-32.

It is not sufficient to show that the testator has either by his will, or by some other instrument, charged his real estate with payment of his debts, for that charge may only have been meant to take effect after the personalty has been exhausted; nor is it sufficient to show that the testator has by his will given away his personalty, for that must be taken to have been only after debts have been paid. But where the two points are both existing, that is, where the personalty is by the will given away as a whole and not as a residue, and the debts and funeral and testamentary expenses are charged upon the real estate, then this will amount to an implied intention that the general personal estate is to be exonerated, and that the realty is to be the primary fund for their payment.[1] Further, if a testator has devoted certain specific personal assets to payment of his funeral expenses and debts, they will be paid out of those assets before the general personal estate is resorted to. The position is well shown by the case of *Trott* v. *Buchanan*.[2] There the testator had, by a deed, conveyed certain real and personal estate to trustees on trust, after his decease, to sell and to pay his debts and funeral expenses out of the proceeds of sale, and hold the balance in trust for his sons. He subsequently made his will, which, after reciting the deed, gave all the residue of his property not comprised therein for the benefit of his wife and granddaughter. It was held that the testator's estate must be resorted to for the payment of debts in the following order: (1) The specific personalty comprised in the deed; (2) The general personal estate; (3) The realty comprised in the deed; (4) The residuary realty under the will.

Trott v. *Buchanan.*

[1] *Greene* v. *Greene*, 4 Madd., 148; *Gilbertson* v. *Gilbertson*, 34 Beav., 354; 2 Wh. & Tu., 742, 743.

[2] 28 Ch. D., 446; 54 L. J., Ch., 678; 52 L. T., 248; Brett's Eq. Cas., 278.

Creating mixed fund for payment of debts.

It may also be observed that, although not exonerating his personal estate from its primary liability for payment of his funeral expenses and debts, yet a testator may, by express words or necessary implication, make other portions of his estate equally liable primarily together with his personalty, *e.g.*, if by his will he gives his whole realty and personalty together, and thus creates one aggregated fund, and directs that thereout shall be paid his funeral expenses and debts. In such a case the personalty and the realty must contribute rateably.[1]

Blended funds.

Ancestral debts.

The fourth and fifth exceptions above given may now be classed together; but formerly, although the fourth exception existed, the fifth did not. The fourth exception is best explained by an instance. A creates a mortgage upon Whiteacre, and dies, leaving Whiteacre to descend to his heir B, who then dies. Now, this ancestral debt is not payable out of B's general personal estate, unless indeed he has in some way adopted it and made it his debt, but it is payable out of Whiteacre.[2] But in other cases of mortgages, the mortgage debt was, in administering the estate, regarded in the same way as any other debt, and was payable out of the general personal estate. The law on this subject has, however, now been entirely altered by Locke King's Act,[3] and two amending statutes[4] (all of which are now properly quoted as the Real Estates Charges Acts), and, by reason of these enactments, the fifth exception above mentioned is now existing. The effect of these enactments may be shortly stated as follows:—When a person dies possessed of any

Mortgage debts not ancestral.

Real Estates Charges Acts.

[1] *Ashworth* v. *Munn*, 34 Ch. D., 391; 56 L. J., Ch., 451; 56 L. T., 86.
[2] 1 Wh. & Tu., 24.
[3] 17 & 18 Vict., c. 113.
[4] 30 & 31 Vict., c. 69; 40 & 41 Vict., c. 34.

freehold, copyhold, or leasehold[1] property which is subject to a mortgage, or to a vendor's lien for unpaid purchase-money, or to any other equitable charge, then the devisee or legatee to whom it passes by his will, or the heir or next-of-kin to whom it passes under his intestacy, takes the land subject to the burden upon it—in other words, the debt existing in respect of it must be primarily[2] paid out of it. Thus, in one case, a testator who died in 1890 had devised certain land to his brother. In 1884 judgment had been recovered for £1,550 against the testator, and the land devised by the testator to his brother was, under a writ of elegit, delivered in execution for the judgment debt, which debt remained unsatisfied at the testator's death. It was held that the land having been seized in execution during the testator's lifetime, the judgment debt was a charge on the land, and must therefore be paid out of the land itself in exoneration of the testator's general personal estate.[3] The operation of these provisions of the Real Estates Charges Acts can be excluded[4] by clear and unmistakeable words in a will or deed; but not by a simple direction to pay debts out of personal estate, or out of residuary real and personal estates, or out of residuary real estate.

Re Anthony, *Anthony* v. *Anthony*.

Referring again to the general order in which assets are applied, it has been pointed out that this is an order existing only between the different persons interested in the estate, and that it does not

The order of application of assets only affects the beneficiaries.

[1] Including a rent charge issuing out of leasehold land, *Re Fraser*, *Lowther* v. *Fraser* (1904), 1 Ch., 111, 726; 73 L. J., Ch., 481; 52 W. R., 516.

[2] This is only as between the person who gets the land and the rest of the estate; the creditor's right to get full payment out of the personal estate or otherwise is not interfered with (17 & 18 Vict., c. 113).

[3] *Re Anthony*, *Anthony* v. *Anthony* (1892), 1 Ch., 450; 61 L. J., Ch., 434; 66 L. T., 181.

[4] See *Re Fleck*, 37 Ch. D., 677; 57 L. J., Ch., 543; 58 L. T., 624.

affect the right of creditors to resort, at their pleasure, to any portion of the estate for payment. Creditors have not to consider the rights of the beneficiaries; that is merely a matter to be arranged and settled between them, an arrangement which is known as the marshalling of assets. This may be defined as a right possessed by beneficiaries, or a liability to which they are subject, under which, as between themselves, the assets are to be arranged so that, substantially, the order (previously set out) in which they are to be applied for payment of debts shall not be affected, notwithstanding the act of any claimant. It is an application of the principle *Nemo ex alterius detrimento fieri debet locupletior*, or, in the words of Lord Eldon, "a person having two funds to satisfy his demands, shall not by his election disappoint a party who has only one fund."[1] Thus, supposing that a creditor obtains judgment against the executor, and levies execution against the residuary personal estate, here ordinarily no case of marshalling arises, for this is the primary fund for payment of the debts; but, suppose that he seizes in execution a horse specifically bequeathed, which he has a perfect right to do, here the doctrine would be applied, for this legatee would have a right to have the value of the horse made good to him, as against others interested in the estate, who, in the order in which assets are administered, ought to be losers before him. This doctrine of marshalling is a natural result of there being a fixed order for application of assets, for without it effect could not be given to such order, as, of course, it would be unreasonable to dictate to a creditor which part of the estate of his deceased debtor he should first resort to. He is naturally entitled to resort to whatever part of the estate he pleases, for all of

Marshalling of assets.

Definition.

Instance of the doctrine.

[1] 1 Wh. & Tu., 46.

it constitutes assets of the testator applicable for payment of his debts; and then, if he disturbs the order, matters are rectified between the beneficiaries by this process of marshalling.[1]

Marshalling as regards legatees against heirs.

The principle of marshalling of assets will be found applying in cases somewhat outside the strict words of the definition of the doctrine which we have given—a definition which is framed more with the view of bringing home to the student the general idea of the subject than with any design of completeness. It may be further illustrated by reference to the subject of legacies. General legacies are payable only out of personalty unless they are charged on realty, which may be done by the express words of the testator, or by implication from the language made use of by him in his will, *e.g.*, if after a gift of certain legacies the testator gives away all the "rest and residue" of his real and personal estate; and many other words may produce the same result.[2] Where this is the case the personal estate still remains the primary fund for payment of the legacies, but if that is not sufficient, then the realty is resorted to.[3] Suppose, however, that the legacies are not charged on the realty, and that a creditor so exhausts the personal estate of the testator that there is not sufficient left to pay general legatees their legacies, but at the same time there are certain lands undisposed of by the will, which go to the testator's heir-at-law; here the legatees although their legacies are not charged on the realty, are nevertheless allowed to stand in the shoes of the creditors, and practically get paid their legacies out of the land

Charging legacies on the realty.

[1] See hereon generally *Aldrich* v. *Cooper*, and Notes, 1 Wh. & Tu., 36.

[2] *Re Adams & Perry* (1899), 1 Ch., 554; 68 L. J., Ch., 259; 80 L. T., 149; 47 W. R., 326.

[3] *Greville* v. *Browne*, 7 H. L. Ca., 689.

descended, for they are objects of the testator's bounty, whilst the heir-at-law is not. But the legatees, in the absence of a charge of the legacies on the realty, would have no such right against lands devised by the testator, because the devisee would be, naturally, as much as the legatees, an object of the testator's bounty.[1]

Marshalling between legatees.

The principle of marshalling is also applicable in some cases between legatees, as where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged; here, if the personal estate proves insufficient to pay them all, the legacies charged on the real estate are paid out of that, so as to leave the personalty for those legatees who have no charge on the realty, and, therefore, no right to be paid thereout. And if the legacies charged on land have been paid out of the personalty, so that there is not sufficient left to pay the others, then the latter are entitled to stand in the shoes of the former, and get paid out of the land, to the extent of the charge on the land possessed by them.[2]

The Court did not marshal in favour of a charity.

But the doctrine of marshalling, or arranging assets so as to give effect to the testator's desires, is not of universal application, there being in particular, prior to the Mortmain Act 1891,[3] one prominent exception to it, viz.: with respect to charities. It may be stated as a general rule that assets were never marshalled in favour of legacies given to charities, upon the ground that the Court was not warranted in setting up a rule of equity contrary to the common rule of the Court, merely to support a bequest which was contrary to law.[4]

Reason for this.

[1] *Hanby* v. *Roberts*, Amb., 128.
[2] 1 Wh. & Tu., 49.
[3] 54 & 55 Vict., c. 73.
[4] Per Lord Hardwicke in *Mogg* v. *Hodges*, 2 Ves., 53.

The point was this—land could not be given to a charity by will (except to the small extent provided for by the Mortmain Act 1888[1]), nor even money charged on land or in any way savouring of realty, *e.g.*, money due on a mortgage of land.[2] In so far as any charitable legacies were made payable out of such prohibited property, therefore, they would fail, and the Court would not so arrange matters as to throw the charitable legacies exclusively on that portion of the testator's estate which might by law be applied to their payment. Thus, suppose a testator gave his whole estate, consisting of realty, leaseholds, money on mortgage, and money at the bank, to trustees, in trust to sell and get in, and pay various legacies, in all amounting to, say, £5,000, and amongst the legacies was one of, say, £300 to a charity. Suppose the realty to realize £2,000, the leaseholds £1,500, the money on mortgage to be £500, and the money at the bank £2,000. Here we have a total estate ample to pay all legacies; but the legacies were given payable out of the whole estate, and, therefore, in so far as that estate was composed of prohibited property—that is, property which could not be given by will to a charity because it was not pure personalty—any charitable legacy must have failed. One-third only of the total estate mentioned above could by law be given by will to a charity, and the other two-thirds consisted of prohibited property, and, therefore, one-third only of the charitable legacy would be paid, viz., £100. Yet, had the Court applied the doctrine of marshalling, the funds

Instance.

[1] 51 & 52 Vict., c. 42, sec. 6.

[2] A bequest to a charity of railway debentures, or debentures of any company or body, was held not to be a bequest of an interest in land, and was therefore good (*Attree* v. *Hawe*, 9 Ch. D., 337; 47 L. J., Ch., 863). It has also been held that a mortgage bond given by Harbour Commissioners could be bequeathed to a charity (*Re Christmas, Martin* v. *Lacon*, 30 Ch. D., 544; 54 L. J., Ch., 1164).

might have been so arranged as to have left the money at the bank to pay the charitable legacy in full.[1]

Marshalling by the testator.

It followed, therefore, that a testator when giving charitable legacies ought always to have expressly directed them to be paid out of his pure personalty in priority to other legacies. And where a testator had given this direction, and had charged his real estate with payment of his debts, the charity legatees always had a right to stand in the place of creditors who might have exhausted the pure personalty, because it was not the Court, but the testator, who, in such cases, marshalled the assets.[2]

Provision of Mortmain Act 1891.

But now the Mortmain Act 1891,[3] which applies to the wills of all testators dying after 5th August, 1891,[4] provides that land may be given by will for any charitable use, subject to this, that such land must be sold within one year after the testator's death, or such further time as the High Court, or a Judge in Chambers, or the Charity Commissioners, allow[5]; and if the sale thereof is not completed within the time allowed, the land vests forthwith in the official trustee of charity lands, and the Charity Commissioners must enforce the sale thereof.[6] It is also provided that personal estate by will directed to be laid out in the purchase of land, to or for the benefit of any charitable use, shall be held for the charitable use as if the will contained no direction to lay it out in the purchase of land[7]; and lastly, when it is necessary for actual occupation for the purposes of the charity, the High Court, or a Judge at Chambers, or the Charity Commissioners, may

[1] 1 Wh. & Tu., 54, 55.
[2] *Attorney General* v. *Lord Mountmorris*, 1 Dick., 379.
[3] 54 & 55 Vict., c. 73.
[4] Sec. 9. *Re Bridger* (1893), 1 Ch., 44; 62 L. J., Ch., 146; 67 L. T., 549.
[5] Sec. 5.
[6] Sec. 6.
[7] Sec. 7.

sanction the retention of land devised to a charity, or the purchase of land with money directed by a will to be laid out in land.[1] So now, when a will contains a gift to a charity of land, or of money savouring of realty, or of money to be laid out in land, the charity does, at any rate, always get the substantial benefit, and, therefore, as regards wills made by testators dying after 5th August, 1891, the fact that the Court will not marshal assets in favour of a charity is of no importance.

Marshalling of securities.

It should be noticed that the principle of marshalling is not confined to the administration of assets, but is applied to other cases where the parties are living, and is then styled the marshalling of securities. Therefore, if a person having two estates, mortgages both to A, and then one only of them to B, the Court, in order to relieve B, will direct A to get paid first, as far as he can, out of that estate only which is not in mortgage to B, and this whether B had notice of the previous mortgage or not.[2] But this doctrine will not be enforced to the prejudice of a third party, so that, for example, the Court will not marshal in favour of a second mortgagee against a third mortgagee.[3] In other words, if a mortgagor is entitled to two properties, Whiteacre and Blackacre, and makes three mortgages of them to A, B, and C respectively, A's first mortgage including both estates, B's second mortgage including only Whiteacre, and C's third mortgage including both, the Court will not marshal in favour of B as against C, but will direct that A should be paid rateably out of Whiteacre and Blackacre, so that B will, if there be sufficient, be satisfied out of Whiteacre, and thus leave what may then remain of the two

No such marshalling to the prejudice of a third party.

[1] 54 & 55 Vict., c. 73, sec. 8.

[2] 1 Wh. & Tu., 56. *Re Loder*, 56 L. J., Ch., 230; 55 L. T., 582; 35 W. R., 58, is a good example of marshalling securities.

[3] *Barnes* v. *Racksters*, 1 Y. & C. C. C., 401.

Unless by express words.

estates for C.[1] But if a third mortgagee by his mortgage takes expressly subject to and after payment of the first two mortgages, the second mortgagee will be entitled to marshal as against the third.[2]

No marshalling in favour of a creditor to the prejudice of another's rights.

Webb v. *Smith.*

In a somewhat recent case, an unsuccessful attempt was made to extend the idea of marshalling. The defendants were auctioneers, and had sold for and on the instruction of one Canning (1) a brewery, and (2) certain furniture. After the sale, and before completion, Canning gave a charge on the balance of the proceeds of the brewery in the defendants' hands to the plaintiff, to whom he owed money, and the plaintiff gave the auctioneers notice of this charge, which did not extend to the proceeds of the furniture. The defendants paid over to Canning the proceeds of the furniture, and appropriated part of the money received by them in respect of the brewery towards payment of their charges and expenses in connection with that sale. There was not enough to satisfy the plaintiff, and he brought this action complaining that the defendants had not acted rightly, because though they no doubt had a lien on the proceeds of the sale of the brewery for their charges in respect of that sale, yet they ought to have marshalled the two funds and paid themselves the whole of their charges out of the proceeds of the furniture, and thus left the money arising from the brewery entirely for the plaintiff. The Court of Appeal decided that this argument could not be maintained, for the defendants had a right to do as they had done, and there was no obligation on them to leave intact, for the benefit of the plaintiff, the fund on which he had a charge. It must be noticed here that the defendants had by agreement with Canning a particular lien on the proceeds of the brewery sale

[1] 1 Wh. & Tu., 57.
[2] *Re Mower's Trusts*, L. R., 8 Eq., 110.

for their charges in respect of the sale, but that they had strictly no lien on the proceeds of the furniture sale, but only a right of retainer and set-off in an action. No doubt, had they paid over the brewery fund to the plaintiff without deducting their charges, and had Canning sued them for the furniture fund, they could have pleaded all their charges by way of set-off, but set-off is not always available, and they might in so acting have run some risk. This is the principle on which the case was decided, and the rule to be deduced from it may be stated in general terms to be, that there can be no marshalling in favour of a creditor to the prejudice of another man's rights.[1]

Provisions of Land Transfer Act 1897, as to administration.

With regard to Part I. of the Land Transfer Act 1897, under which, in the case of deaths occurring after 1897, real estate is to be administered by the personal representatives as if it were personalty, it must be borne in mind that it is specially provided that nothing therein contained shall alter or affect the order in which real and personal assets respectively were then applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estates to be charged with the payment of legacies.[2]

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[1] *Webb* v. *Smith*, 30 Ch. D., 192; 55 L. J., Ch., 343; 53 L. T., 737; Brett's Eq. Cas., 284.
[2] 60 & 61 Vict., c. 65, sec. 2 (3).

CHAPTER IV.

OF THE DISSOLUTION OF PARTNERSHIP, AND THE TAKING OF PARTNERSHIP AND OTHER ACCOUNTS.

Definition of partnership.

THE Partnership Act 1890 [1] contains a digest of the general law of partnership, and in that Act, subject to certain limitations, partnership is defined as the relation which subsists between persons carrying on a business in common with a view to profit.[2] It is not proposed to consider here the subject of the constitution of a partnership, or the different kinds of partners and their liabilities, these being matters of a strictly Common Law nature [3]; but to deal with such matters appertaining to the law of partnership as have been usually the proper subjects of the jurisdiction of the Court of Chancery, and which matters are now assigned to the exclusive jurisdiction of the Chancery Division of the High Court of Justice. It has, however, been thought advisable to set out the Partnership Act 1890 in the Appendix to this work, and reference can usefully be made to it.

Different ways in which a partnership may be dissolved.

The subject of dissolution of partnership is particularly one to be dealt with in any treatise on Equity. By the Partnership Act 1890, it is provided that, subject to any agreement between the partners, a partnership is dissolved in any of the following ways:—

1. If entered into for a fixed term, by the expiration of that term.

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[1] 53 & 54 Vict., c. 39.
[2] Sec. 1.
[3] See, as to such matters, Indermaur's Principles of Common Law, 156-164, Indermaur & Thwaites' Conveyancing, 37-43; and generally on Partnership, see Pollock's Digest of the Law of Partnership, and Lindley's Law of Partnership.

2. If entered into for a single adventure or undertaking, by the termination thereof.

3. If entered into for an undefined time, by a notice by any partner to determine it, in which case the partnership is dissolved as from the date mentioned in such notice, or if no date is mentioned, as from the date of the communication of the notice.

4. By reason of the death or bankruptcy of any partner.

5. If any partner suffers his share of the partnership property to be charged under this Act for his separate debt; but this will only operate as a dissolution at the option of the other partners.

6. By the happening of any event which makes it unlawful for the business of the firm to be longer carried on.

7. By judgment of the High Court of Justice.[1]

Charging a partner's share for his private debt.

With regard to the cause of dissolution numbered "5," it will be observed that this operates as a dissolution only if the other partners elect that this shall be so. The Partnership Act 1890 contains a special provision as regards the mode of charging a partner's interest in the concern for his private debt. Execution cannot be issued, but the Court, or a judge thereof, may, on application by summons by any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits, with payment of the amount of the judgment debt; and may appoint a receiver of that partner's share in the partnership, and direct all accounts and enquiries, and give all orders and directions which might have been directed, or given, if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require. The other

[1] 53 & 54 Vict., c. 39, secs. 32-35.

partner, or partners, are, however, at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase the same.[1]

Death of a partner.

With regard to dissolution by reason of death of a partner, although death operates to dissolve a partnership, and the personal representatives have a right to have the concern wound up, yet this is, naturally, subject to any provisions with regard to the matter contained in the partnership articles. If the articles contain a provision that, in the event of death, the personal representatives shall succeed to the deceased's share and be partners in his place, they may, if they desire, take advantage of it, but they cannot be compelled to come in against their will.[2]

Grounds for the Court decreeing a dissolution.

The cause of dissolution numbered "7," viz., by judgment of the Court, is the one to which it is here necessary to give special attention, and the following are the cases in which the Partnership Act 1890 provides that the Court may decree the dissolution of a partnership :—

1. When a partner is found lunatic by inquisition, or is shown to be of permanently unsound mind, in which cases the application may be made as well on behalf of that partner as by any other partner.

2. When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract, *e.g.*, where an active partner becomes so ill as to permanently prevent him giving his attention to the business.

3. When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of

[1] 53 & 54 Vict., c. 39, sec. 23.
[2] *Lancaster* v. *Allsup*, 57 L. T., 53.

the business, is calculated to prejudicially affect the carrying on of the business.

4. When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business, that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.

5. When the business of the partnership can only be carried on at a loss.

6. Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.[1]

Date of dissolution under Court's order.

Dissolution by order of the Court takes effect as from the date of the judgment, unless ordered on the ground of a specific breach of duty giving the other member, or members, a right to dissolve the partnership, in which case it may relate back to that event.[2] In the case of a partnership at will, however, if that is dissolved by the Court, the dissolution takes effect from the date of the service of the writ in the action.[3]

Procedure.

The ordinary course of procedure in an action asking for dissolution is, that the case being made out, a judgment is given for dissolution, and for accounts to be brought in, and the Court will also, to protect the property, usually appoint a receiver, and, if necessary, a manager. If a receiver only is appointed, the effect is to stop the business; he collects the debts and realizes the assets, and then the partnership debts are paid and any balance divided. If it is desired to preserve the assets and

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[1] 53 & 54 Vict., c. 39, sec. 35.
[2] Pollock's Partnership, 102.
[3] *Unsworth* v. *Jordan*, W. N. (1896), 2.

goodwill, a manager or receiver and manager is appointed, who can buy and sell and carry on the business and complete existing contracts, and then the business can be sold as a going concern.[1] The manager is personally[2] liable on contracts made by him, but can claim indemnity out of the estate.[3] The accounts being taken and certified in the Judge's Chambers, a final order is then made winding up the whole matter. As a general rule, the Court will not interfere between partners, except in this general and complete way; it will not, because there are disputes, appoint a manager, or receiver, and direct accounts and settle the disputes, and then relegate the partners to their original positions; but in some exceptional cases the Court will decree an account, although no dissolution is intended or prayed for, the general rule being, that where a partner has been excluded, or the conduct of the other partner has been such as would entitle the complaining one to a dissolution against him, a general account to the time of the issuing of the writ will, if desired, be decreed, but in no case will a continuing account be ordered, as that would be, practically, the carrying on of the business by the Court.[4] And in some particular matters the Court will interfere without assuming any general jurisdiction; thus, it has been held that the Court has jurisdiction to entertain an action by one partner against another, merely asking for an order for the other partner to sign a notice of dissolution for insertion in the *Gazette*, in accordance with agreement, or for some other person to be appointed to sign it for him.[5]

Exceptional relief.

Ordering partner to concur in signing dissolution notice.

[1] *Taylor* v. *Neate*, 39 Ch. D., 538; 57 L. J., Ch., 1044; 60 L. T., 179.

[2] *Burt* v. *Bull* (1895), 1 Q. B., 276; 64 L. J., Q. B., 232; 71 L. T., 810. A receiver and manager not appointed by the Court (*e.g.*, by a mortgagee) is not so personally liable because he is simply an agent, *Owen* v. *Cronk* (1895), 1 Q. B., 265; 64 L. J., Q. B., 288.

[3] *Strapp* v. *Bull* (1895), 2 Ch., 1; 64 L. J., Ch., 658; 72 L.T., 514.

[4] Snell's Equity, 519, 520.

[5] *Hendry* v. *Turner*, 32 Ch. D., 355; 55 L. J., Ch., 562; 54 L. T., 292; and see 53 & 54 Vict., c. 39, sec. 37.

Return of premium paid.

In a partnership suit, the Court will determine all questions in dispute between the partners in connection with the business, and their rights therein. Thus, one partner may have paid a premium, and there may be a question as to whether he is not entitled to a return of some portion of it. The Partnership Act 1890 contains a special provision that where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract, and to the length of time during which the partnership has continued, unless the dissolution is (1) by the death of a partner, or (2) wholly or chiefly due to the misconduct of the partner who paid the premium, or (3) by an agreement containing no provision for a return of any part of the premium.[1]

Right to proportion of profits after dissolution.

Again, there may be questions, even after a dissolution, as to the right of a partner who has left capital in the firm, to have a share of the profits by reason of the use made of his capital. With regard to this, the Partnership Act 1890[2] provides that where any member of a firm has died, or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with his capital or assets, without any final settlement of accounts as between the firm and the outgoing partner, or his estate, then, in the absence of any agreement to the contrary, the outgoing partner, or his estate, is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership

[1] 53 & 54 Vict., c. 39, sec. 40.
[2] Sec. 42.

assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets. But this enactment is subject to this proviso, that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate (as the case may be), is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof, he is liable to account as before mentioned.[1] Where a partner, or his representative, elects to take the share of the profits made since the dissolution, there is no fixed rule that the profits are divisible as if the partnership had not ceased, but it is entirely a question to be determined by the Court, having due regard to the nature of the business, the amount of capital from time to time employed in it, and the conduct of the partners generally.[2]

Arbitration.

Arbitration Act 1889.

It must, however, be noticed that the jurisdiction of the Court in connection with disputes arising between partners is, to a certain extent, liable to be ousted by the process of arbitration. By the Arbitration Act 1889[3] it is provided that whenever a party to a submission to arbitration shall, nevertheless, commence an action in respect of the matters so agreed to be referred, the Court may, on application made at any time after appearance, and before delivering any pleadings or taking any other step in the proceedings,[4] stay the action on such terms as it may think fit, on being satisfied that no sufficient reason exists why such matters

[1] 53 & 54 Vict., c. 39, sec. 42.
[2] Pollock's Partnership, 126 (*u*).
[3] 52 & 53 Vict., c. 49, sec. 4.
[4] See Indermaur's Practice, 359-361.

should not be referred in accordance with the submission, and that the applicant was, at the time of bringing such action, and still is, ready and willing to do all things necessary to the proper conduct of the arbitration.[1] Even if the question involved in an action is whether the partnership shall be dissolved, this is still a matter which can be referred under this provision.[2]

The assets of the partnership.

The accounts brought in in any general partnership action should show the whole assets or property of the concern, including any land involved in the partnership business, whether purchased by the partners or acquired in any other manner. And it should be noticed that where land has become partnership property, it is treated, as between the partners and their representatives, as personal and not real estate, unless a contrary intention appears either by express agreement, or by the conduct of the partners.[3] The goodwill of the business also forms part of the partnership assets,[4] and every partner has a right, in the absence of any agreement to the contrary, to have that goodwill sold for the common benefit of the partners. By goodwill is meant the benefit arising from connection and reputation, and its value has been stated to be what can be got for the chance of being able to keep and improve that connection.[5] Irrespective of rights in a dissolution action, it has been held that the goodwill does not survive any more than other partnership property, but must be treated as a common partnership asset.[6] It may, however, be observed that the

Land.

Goodwill.

[1] The staying of an action is a matter entirely in the Court s discretion (*Re Carlisle, Clegg* v. *Clegg*, 44 Ch. D., 200; 59 L. J., Ch., 520; 62 L. T., 821).

[2] *Vawdrey* v. *Simpson* (1896), 1 Ch., 166; 65 L. J., Ch., 369; 44 W. R., 123; *Machin* v. *Bennett*, W. N. (1900), 146.

[3] 53 & 54 Vict., c. 39, sec. 22.

[4] *Jennings* v. *Jennings* (1898), 1 Ch., 378; 67 L. J., Ch., 190.

[5] Lindley's Partnership, 476.

[6] *Smith* v. *Everett*, 27 Beav., 446.

goodwill is often not a very valuable asset, for, notwithstanding its sale, there is nothing, in the absence of covenant or agreement to the contrary, to prevent any partner setting up a like business, though he must not go so far as to solicit the customers of the old business to come to him, nor must he in any way represent himself as actually being the old firm.[1] If a person purchases the goodwill of a business, he is entitled to use the name of the vendor so as to show that the business was the one formerly carried on by the vendor, but of course not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts are to be made.[2]

Trego v. *Hunt*.

Rules as to the administration of the assets.

In the administration by the Court of the assets of deceased partners, and of bankrupt and insolvent partners, the rules observed are that the partnership property is applied as joint estate in payment of the debts of the firm, and the separate property of each partner is applied as separate estate in payment of his separate debts. Then, after such payments, any surplus of the joint estate is applied in payment of the separate debts of the partners, and any surplus of the separate estate is applied in payment of the debts of the firm.[3] The rule is that the two estates are held entirely distinct, but to this rule there are certain exceptions, viz :—

1. A creditor of the firm may, if he prefers, prove

[1] *Trego* v. *Hunt* (1896), A. C., 7 ; 65 L. J., Ch., 1 ; 73 L. T., 514 ; Brett's Eq. Cas., 348. See also *Gillingham* v. *Beddow* (1900), 2 Ch., 242 ; 69 L. J., Ch., 527, where it was held that an express provision in the articles that an outgoing partner might start a similar business in the neighbourhood was merely declaratory, and did not exclude the rule against soliciting old customers.

[2] *Thynne* v. *Shove*, 45 Ch. D., 577 ; 59 L. J., Ch., 509 ; 62 L. T., 803 ; *Burchell* v. *Wilde* (1900), 1 Ch., 551 ; 69 L. J., Ch., 314 ; 82 L. T., 576 ; *Townsend* v. *Jarman* (1900), 2 Ch., 698 ; 69 L. J., Ch., 823 ; 83 L. T., 366.

his debt in the first instance against the separate estate of a partner if the debt has been incurred by means of a fraud practised on the creditor by the partners, or any of them.[1]

2. A creditor of the firm may prove against the separate estate of a partner if there is absolutely no joint estate and no solvent partner who can be sued.[2]

Furthermore, with regard to the rights of a firm, and of the individual members thereof, no partner in the firm is allowed to prove in competition with the creditors of the firm, either against the joint estate of the firm, or against the separate estate of any other partner, until all the debts have been paid in full. To this rule, however, there are two exceptions, viz. :—

1. Where two firms having one or more members in common, or a firm and one of its members, have carried on business in separate and distinct trades, and dealt with one another therein, and the one firm or trader has become a creditor of the other in the ordinary way of such dealing.

2. Where separate property of a partner has been fraudulently converted to the use of the firm, or property of the firm has been fraudulently converted to the use of any partner, without the consent or subsequent ratification of the partner, or partners, not concerned in such conversion.[3]

Partnership debts are generally joint debts.

Every partner in a firm is liable, jointly with the other partners, for all debts and obligations of the firm incurred while he is a partner; and though the partners are not liable severally as well as jointly, yet after a partner's death his estate is also severally liable, in a due course of administration, for such

[1] *Ex parte Adamson*, 3 Ch. D., 807 ; 47 L. J., Bk., 103.
[2] *Re Budgett, Cooper* v. *Adams* (1894), 2 Ch., 557; 63 L. J., Ch., 847.
[3] Pollock's Partnership, 163, 164.

debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his separate debts; that is to say, a creditor may claim against the separate estate of the deceased partner without first proceeding against the joint estate.[1] In the case of a deceased partner's estate it does not matter in what order the partnership creditor pursues his concurrent remedies, but such remedies are subject to the two following rules, viz.: (1) The partnership creditors must be postponed to the separate creditors of the deceased partner, and (2) The surviving partner must in some way or other be present at the taking of the partnership accounts.[2] If a creditor of a firm first seeks payment out of the estate of a deceased partner, he is not precluded from afterwards suing the surviving partners.[3]

Accounts.

The taking of the accounts is an important matter in every partnership action, but, leaving the subject of partnership in particular, it is proposed now to deal with accounts generally; for it must be remembered that the taking of accounts occurs in many cases, *e.g.*, between trustee and *cestui que trust*, between mortgagor and mortgagee, by a patentee against an infringer, and in ordinary cases of the administration of the estates of deceased persons. A principal also may maintain an action for accounts against his agent, though ordinarily an agent cannot against his principal, for he reposes no confidence in the principal, so that the position is not the same as that of the principal claiming against his agent. But

Between principal and agent.

[1] 53 & 54 Vict., c. 39, sec. 9; and see *Kendall* v. *Hamilton*, 4 App. Ca., 504; 48 L. J., C. P., 705. See also *Re Doetsch, Matheson* v. *Ludwig* (1896), 2 Ch., 836; 65 L. J., Ch., 855; 75 L. T., 69, where it was held that this rule of procedure applied to the case of a foreign firm having a place of business here, and one of the partners domiciled here dying, leaving assets here, notwithstanding that the law of the foreign country is different to ours.

[2] *Re Hodgson, Beckett* v. *Ramsdale*, 31 Ch. D., 177; 55 L. J., Ch., 241; 54 L. T., 222.

[3] Lindley's Partnership, 224.

if in any case confidence is necessarily reposed, *e.g.*, the agent solicits orders which are to be sent direct to the principal, and then the agent is to have commission, it is otherwise. As a rule, if one co-owner of property derives profit from it (*e.g.*, receives rent of land, or dividends on stock, or hire for goods, or increase by breeding), an account lies against him[1]; but this does not apply to a patent, for each co-owner can work it for his own benefit without account,[2] even though he be mortgagee of the other share.[3]

Between co-owners.

Accounts may be said to be of three kinds, viz.: (1) An open account, where the balance is not struck, or is not accepted by all the parties; (2) A stated account, where it has been expressly or impliedly acknowledged to be correct by all the parties; and (3) A settled account, which is where it has not only been acknowledged to be correct, but has been discharged by payment, or otherwise, between the parties.[4]

Three kinds of accounts.

An action for an account is ordinarily brought when no account has been rendered, or the account is an open one, and if the defendant is a person liable to account there is usually no defence to the action. The claim for an account ordinarily goes only to moneys received and paid by the party against whom the account is claimed; but in some cases wilful default is alleged,[5] and the account then goes further, viz., to such moneys as, but for the party's wilful neglect or default, he would have

Open accounts.

Wilful default.

[1] Lindley's Partnership, 37. And see 4 Anne, c. 16, sec. 27.

[2] *Sheehan* v. *G. E. Ry.*, 16 Ch. D., 59; 50 L. J., Ch., 68; 43 L. T., 432.

[3] *Steers* v. *Rogers* (1893), A. C., 232; 62 L. J., Ch., 671 68 L. T., 726.

[4] Wharton's Law Lexicon, Tit. "Account."

[5] As to what will, and what will not, amount to a "wilful default," see *Re Stevens*, *Cooke* v. *Stevens* (1898), 1 Ch., 162; 67 L. J., Ch., 118; 77 L. T., 508.

received. When an account is directed to be taken in this way, the account is said to be taken on the footing of a wilful default; and an account will be directed to be so taken where an executor has improperly, or unreasonably, omitted to enforce payment of a debt for several years, whereby it has become statute barred and lost to the estate.[1] The fact that the account has been settled, or even stated, between the parties, is ordinarily a good defence to an action for accounts; and the fact of payment of the balance, or the signature of the account by the parties is, of course, the best evidence hereon; but even without that, if the account has been rendered, and some considerable time has elapsed without any objection being made, this may amount to sufficient evidence on this point.[2] And with regard to the question of time, if the account is one founded on legal rights, the Statutes of Limitation will apply to bar any right after the prescribed time; but if it is an account between trustee and *cestui que trust*, then hitherto the Statutes of Limitation have had no application, and the question of whether the Court will entertain the action has depended solely on the point of whether there has been laches, for the student will bear in mind in such cases the force of the maxim, *Vigilantibus non dormientibus æquitas subvenit*.[3] The provisions of the Trustee Act 1888[4] on this point must now be borne in mind, viz.: in all proceedings commenced after 1st January, 1890, a trustee may take advantage of the Statutes of Limitation, except when the claim against him is for fraud, or fraudulent breach of trust to which the

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[1] See *Re Bowen, Bennett* v. *Bowen*, 20 Ch. D., 538; 51 L. J., Ch., 825; *Re Roberts, Knight* v. *Roberts*, 76 L. T., 479.

[2] *Irvine* v. *Young*, 1 S. & S., 333; *Willis* v. *Jarnegan*, 2 Atk., 252; *Tickel* v. *Short*, 2 Ves., 239.
See *ante*, pp. 23-25.

[4] 51 & 52 Vict., c. 59, sec. 8. See *ante*, pp. 103, 104.

trustee was party or privy, or for the recovery of trust property, or its proceeds, still retained by the trustee, or previously received by him and converted to his use.

The relief given as regards stated or settled accounts.

And even where the Court will give relief, although the account has been stated or settled between the parties, there is a difference, according to circumstances, as regards the relief given. In cases where the adjustment, or settlement, has been obtained by fraud, the Court will re-open the accounts altogether[1]; and so also it will do this in some extreme cases of accident or mistake. But, more usually, unless there is evidence of fraud, or undue pressure, or unfair dealing, or improper advantage taken, the Court will refuse to re-open the account altogether, and will simply give the plaintiff liberty to surcharge and falsify.[2] There is a great distinction between these two modes of giving relief; for, whilst the effect of re-opening an account altogether is to cast the burden of proof entirely on the accounting party and compel him to vouch and verify the correctness of the whole account, if liberty is merely given to surcharge and falsify, the account is taken as correct, subject to the right of the plaintiff to call it in question by showing that any amounts have been received and have not been accounted for, which is called surcharging, and by showing that any items of disbursement have been wrongly inserted, which is called falsifying. The distinction in the remedy is founded on good reasoning; for, ordinarily, after the agreeing of a balance on an account, and still more so after its payment, it would be unfair to require the whole account to be again vouched, for the accounting party, by reason of the adjustment and settlement, may very

Surcharging and falsifying.

[1] *Clarke* v. *Tipping*, 9 Beav., 284.
[2] H. A. Smith's Principles of Eq., 553.

likely not have preserved vouchers, as it may be presumed he would carefully have done had the account remained open ; but if it can be shown that he has practised any fraud or unfair dealing, it is only right that he should be dealt with strictly.

The question of appropriation of payments.

When, as in most cases of accounts, there are on the one side items of receipt, and on the other side items of disbursement, a question frequently arises with regard to appropriation of payments, that is as to what particular amount on the one side an item on the other side is to be applied. The following rules are laid down in *Clayton's* Case,[1] which is the leading decision on the subject: (1) That the party liable to perform the obligation, *i.e.*, the debtor, has the right, in the first instance, to declare in respect of which contract, or debt, the payment is made ; (2) That failing his doing this, the person entitled to performance, *i.e.*, the creditor, has such right ; (3) That failing either doing so, then the law considers a payment made to be in respect of the contract, or debt which is earliest in point of date, commencing with the liquidation of any interest that may be due. When under these rules a creditor has the right of appropriating the money, he may even appropriate it to a debt barred by the Statute of Limitations.[2] And where a payment is made to a person to whom two or more debts are due, of a sum not sufficient to satisfy all, and the debts are owing in respect of contracts of the same date, the amounts paid, unless expressly appropriated by one of the parties, will be apportioned between the different debts.[3]

Clayton's Case

Exception to the rule.

But these ordinary rules do not in all cases apply

[1] Tudor's Mercantile Cases, 1.
[2] *Mills* v. *Fowkes*, 5 Bing. (N.C.), 455.
[3] *Favenc* v. *Bennett*, 11 East, 36.

in determining the rights of a *cestui que trust* against his trustee. Thus, where a trustee had paid trust money into his own banking account, and had drawn cheques generally on such account, for his own purposes, it was held that the strict rule in *Clayton's* Case did not apply, so as to produce the result that he must be taken to have drawn cheques against the money earliest paid in, and thus spent the whole trust fund; but that it must be presumed that he intended to do right, and that he had drawn cheques against his own proper moneys rather than the trust moneys. Therefore, it followed that any money remaining at his bank at the time of his bankruptcy must be presumed, so far as was necessary, to still represent the trust money, and that to this extent such money would not pass to his trustee on his bankruptcy as part of his estate.[1] *Re Hallett's Estate.*

The subject of Companies is somewhat connected with that of partnership, but is beyond the scope of the present work, and is a matter best treated of separately, it partly pertaining to Common Law, partly to Equity, and to a very great extent to Practice.[2] Company law.

[1] *Re Hallett's Estate*, 13 Ch. D., 696; 49 L. J., Ch., 415; Brett's Eq. Cas., 170. See also *ante*, pp. 108, 109.

[2] The student is referred, for a separate study of Company Law, to Eustace Smith's Summary of the Law of Companies, or to Topham's Company Law, works written specially for students, or to Palmer's Company Law. Useful chapters on the subject of Companies will be found also in Williams' Personal Property (Part II., Chap. 6), and in Goodeve's Personal Property (Chap. 16). Generally for full information on the subject, see Lindley's Law of Companies. An excellent dissertation on the law affecting Companies will also be found in Vol. III. of the "Encyclopædia of the Laws of England."

CHAPTER V.

MORTGAGES.

Definition of a mortgage.

A MORTGAGE, in its widest sense, may be defined as a security whereby the property in land, or goods, or other property, is passed by one person to another conditionally. Mortgages of land are ordinarily effected by means of a formal deed of mortgage, and mortgages of chattels by a deed which is designated a bill of sale.[1]

Mortgages of land.

Mortgages of land may either be by way of *vivum vadium*, that is a living pledge, or *mortuum vadium*, a dead pledge, though the former is, at the present day, practically unknown.

Vivum vadium.

A *vivum vadium* is where the mortgagor borrows a sum of money and grants his estate to the mortgagee to hold until the rents and profits shall repay the sum so borrowed, and when this object is accomplished then the estate in natural course results back to the borrower.

Mortuum vadium.

On the other hand, a *mortuum vadium* is where the mortgagor borrows a sum of money, and grants his estate to the mortgagee to hold absolutely, subject to this, that if the mortgagor shall repay the money with interest on a given day, then the mortgagee shall re-convey the estate to the mortgagor. This is still the strict form of an ordinary mortgage deed, and we must here notice the different ways in which all such transactions have always been regarded at Common Law, and in Equity, respectively.

[1] Bills of sale given by way of securing money are governed by the Bills of Sale Act 1882 (45 & 46 Vict., c. 45). See hereon Indermaur & Thwaites' Conveyancing, 469-472, and Indermaur's Principles of Common Law 114-122.

Effect of a mortgage at Common Law.

At Common Law, the day named in a mortgage for payment was required to be strictly observed, and if the money was not paid on that day the mortgagor's rights were at an end, and the mortgagee was the absolute and complete owner. The estate was, in fact, granted to the mortgagee absolutely, subject to a certain condition, which condition was required to be strictly observed, and if it was not so observed, the mortgagor's right was gone for ever. But Equity always regarded the transaction in a different light, viz., as purely and simply intended as a security for money; and acting on the maxim, "Equity regards the spirit and not the letter,"[1] the Court of Chancery always allowed the mortgagor to come and redeem his property on payment of principal, interest, and costs, which right is styled the mortgagor's equity of redemption.[2] Equity also gave the mortgagee a right of foreclosure, *i.e.*, to make the property really his own by judicial proceedings if the mortgagor did not redeem it. The equity of redemption, and the right of foreclosure, are the essential points in which Equity differed from Law in regard to a mortgage. The maxim quoted above is the very foundation of the doctrine of Equity on this subject, and this, coupled with another maxim, "Once a mortgage always a mortgage," forms the basis of the rules there observed relating to mortgages. This latter maxim may be shortly stated to mean, that when a transaction is clearly shown to be a mortgage, then a mortgage it must remain; thus, a clause in the mortgage deed, providing that if the money is not paid within five years the mortgagor shall have no further right or equity of redemption, would be perfectly useless.[3] In fact, any attempt in a mortgage deed to clog, fetter or impede those rights which the

Effect in Equity.

Once a mortgage always a mortgage.

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[1] See *ante*, p. 10.
[2] Story, 660, 661.
[3] *Howard* v. *Harris*, 2 Wh. & Tu., 11.

Salt v. *Marquis of Northampton.*

Court of Chancery has decided are the special privileges of a mortgagor is absolutely futile, and the mortgagor cannot be prevented from claiming accounts, and payment of any surplus to him.[1] Whilst Common Law and Equity were distinct systems, we had, therefore, two different rules applying; but it must be remembered that now, under the Judicature Act 1873,[2] the Equity rule prevails over the Common Law rule. It is not, perhaps, too much to say that the doctrine of Equity is a direct restriction on the ordinary rights of freedom of contract. In a modern case, Lord Bramwell said: "I think the equitable rule unreasonable, and I regret to have to disregard the express agreement of a man perfectly competent, and advised by competent advisers."[3]

Mortgagee must not make a collateral advantage.

Following out the idea of a mortgage being simply intended as a security for the amount advanced, and interest thereon, and any costs, there are many cases in which it was formerly laid down that a mortgagee may not in a mortgage stipulate for a collateral advantage in any shape or form.[4] But modern cases have undoubtedly relaxed this rule, and it may now be stated that a clause in a mortgage, by which the mortgagee gains some collateral advantage, is valid if not unconscionable or oppressive. Thus in one case a publican mortgaged his public-house to a brewer, and it was provided that the loan should continue for a period of five years; and the mortgagor covenanted that he would not, during that period,

Biggs v. *Hoddinott.*

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[1] *Salt* v. *Marquis of Northampton* (1892), A. C., 1; 61 L. J., Ch., 49; 65 L. T., 765; *Samuel* v. *Jarrah Timber Co.* (1904), A. C., 323; 73 L. J., Ch., 526; 90 L. T., 731.

[2] 36 & 37 Vict., c. 66, sec. 25.

[3] Per Lord Bramwell in *Salt* v. *Marquis of Northampton*, 61 L. J., Ch., at p. 54.

[4] See *Jennings* v. *Ward*, 2 Vern., 520; *Thompson* v. *Hudson*, L. R., 4 E. & I. Apps., 1; 38 L. J., Ch., 431; *James* v. *Kerr*, 40 Ch. D., 449; 58 L. J., Ch., 355; 60 L. T., 212; *Field* v. *Lopkins*, 44 Ch. D., 524; 62 L. T., 774.

sell on the premises beer other than that supplied by the mortgagee; and it was held that the covenant was valid, and could be enforced by injunction.[1] However, a clause in a mortgage which professes to give the mortgagee some right over, or in connection with, the property mortgaged,[2] or to impose some personal liability on the mortgagor,[3] *after the mortgage is paid off*, is bad as being really a clog on the right to completely redeem. *Noakes* v. *Rice.*

There is nothing to prevent a mortgagee purchasing the equity of redemption from the mortgagor; but such a transaction is looked at jealously by the Court, and where the mortgagor has, under pressure from the mortgagee to pay the mortgage debt, and being in embarrassed circumstances, sold and conveyed his equity of redemption to the mortgagee at a price under its value, the transaction has been set aside.[4] A clause in the mortgage deed giving the mortgagee an option to buy the equity of redemption is void[5]; though such an option is valid if it is a genuinely separate transaction not contained in the mortgage deed.[6] But a clause in the mortgage deed that, if the mortgagor sells his equity of redemption during the mortgage he shall give the mortgagee the refusal of it, is valid, for it leaves the mortgagor free to redeem or to sell, and does not tie him down as to price.[7] Mortgagee buying equity of redemption.

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[1] *Biggs* v. *Hoddinott* (1898), 2 Ch., 307; 67 L. J., Ch., 540; 79 L. T., 201; 47 W. R., 84.

[2] *Noakes* v. *Rice* (1902), A. C., 24; 71 L. J., Ch., 139; 86 L. T., 62. This must be taken to have overruled *Santley* v. *Wilde* (1899), 2 Ch., 474; 68 L. J., Ch., 681; 81 L. T., 393; 48 W. R., 90. See further hereon Indermaur & Thwaites' Conveyancing, 437, 438.

[3] *Bradley* v. *Carritt* (1903), A. C., 253; 72 L. J., K. B., 471; 88 L. T., 633.

[4] *Ford* v. *Olden*, L. R., 3 Eq., 461; and see *Lisle* v. *Reeve*, 85 L. T., 464.

[5] *Samuel* v. *Jarrah Timber Co.* (1904), A. C., 323; 73 L. J., Ch., 526; 90 L. T., 731.

[6] *Reeve* v. *Lisle* (1902), A. C., 461; 71 L. J., Ch., 768; 87 L. T., 308.

[7] See Coote on Mortgages, Vol. I., p. 20.

Position of purchaser of an equity of redemption.

A mortgagor entitled to an equity of redemption may freely assign it, and the purchaser thereof ordinarily stands in the position of, and has the same rights as, the original mortgagor as regards demanding accounts and redeeming the property. The mortgagor remains liable to the mortgagee on the covenants to pay principal and interest. But the purchaser is not personally liable to the mortgagee, unless the latter has joined in the transaction, and released the original mortgagor, and the purchaser of the equity of redemption has covenanted with him to pay the amount, which would raise a case of novation.[1] But, although there may be no novation, yet in an indirect way the purchaser of an equity of redemption will incur a liability, unless it is expressly stipulated to the contrary; for it has been held that, on such a purchase he impliedly agrees with his vendor (the mortgagor) to indemnify him against further liability on the mortgage debt[2]; and that, if the mortgagor pays when sued on his covenant, he is entitled to have a reconveyance to himself subject to such equity of redemption as may subsist in other persons, although the purchaser has created fresh charges in favour of the mortgagee.[3]

Bridgman v. *Daw.*

The doctrine of *Toulmin* v. *Steer.*

But if a mortgagee purchases the equity of redemption, he may sometimes stand in a different position from that occupied by an ordinary purchaser of property. If he is the sole mortgagee, no doubt the property is his absolutely; but if there are several mortgagees, the question arises as to whether he has any right to set up his mortgage against any subsequent incumbrances of which he has notice, or

[1] Novation means the substitution, with the creditor's consent, of a new debtor for the old one. (Wharton's Law Lexicon, 519.)

[2] *Adair* v. *Carder*, 29 L. R., Ir., 467; *Bridgman* v. *Daw*, 40 W. R., 253; *Waring* v. *Ward*, 7 V., jun., 332. See also *Re Errington* (1894), 1 Q. B., 11; 69 L. T., 766.

[3] *Kinnaird* v. *Trollope*, 39 Ch. D., 636; 57 L. J., Ch., 905; 59 L. T., 433.

whether it is not extinguished by his becoming the purchaser—in other words, is he not in the same position as the original mortgagor would be on paying off an incumbrance on the estate, in which case, ordinarily, the incumbrance thus paid off would naturally be extinguished? Thus, say Whiteacre is mortgaged to A for £1,000, to B for £700, and to C for £500, and that A, with notice of B and C's mortgages, purchases the equity of redemption. Can A still hold his mortgage over B and C's heads, or is not his mortgage merged and gone, and has not B become first mortgagee for £700, and C second mortgagee for £500? It was laid down in *Toulmin* v. *Steer* [1] that this was so; but this principle must now be taken subject to this, that if at the time of the purchase by the mortgagee an intention is shown to keep the mortgage alive, then it will not be merged and destroyed, but may still be held by him as a protection against the claims of the subsequent incumbrancers.[2] Manifestly, the most advisable course is that, in the deed under which the mortgagee purchases, a declaration should be inserted to the effect that the incumbrance shall be treated as remaining on foot for the purpose of protecting the purchaser against the other incumbrances, in which case no subsequent incumbrancer could do anything without first paying off this mortgage. Still, even in the absence of anything of this kind, the mortgage would now always be deemed to be kept alive if it was to the mortgagee's interest that it should be. This is really the effect of the House of Lords' decision in the modern case of *Thorn* v. *Cann*,[3] which completely minimises, if it does not altogether sweep away, the doctrine laid down in *Toulmin* v. *Steer*. It was held in *Thorn* v. *Cann* that the

Example.

Thorn v. *Cann*.

[1] 3 Mer., 210.
[2] *Adams* v. *Angell*, 5 Ch. D., 634; 46 L. J., Ch., 54; Brett's Eq. Cas., 268.
[3] (1895) A. C., 11; 64 L. J., Ch., 1; 71 L. T., 852.

question whether a charge is kept alive is one of intention, to be gathered not only from the written instrument, but from the circumstances of the case; and the intention may be presumed from the consideration of whether it is or is not for the benefit of the owner of the charge that it should be kept alive.[1]

Any owner of the equity of redemption, other than the mortgagor paying off a mortgage, may keep it alive.

And on similar principles, although an owner of an equity of redemption, on paying off a mortgage on the estate, must ordinarily be taken to have extinguished it, yet if he is not the original mortgagor he need not necessarily do so, but may, if he desires, still keep it alive. Evidence of intention to keep alive a mortgage which is paid off can always be given; and circumstances may show such an intention, so that where an owner of an equity of redemption, whose title to a share of the property was disputed, paid off a mortgage and took a reconveyance, it was held that the Court would presume an intention to keep the mortgage alive as against the share in dispute.[2] But an original mortgagor cannot pay off and keep alive a mortgage, which he has created, so as to prejudice subsequent incumbrancers.[3]

Distinction between a mortgage and a sale with a condition for re-purchase.

For the rule to exist that a person who has conveyed property to another, subject to a condition for reconveyance to himself on payment of a sum of money on a certain day, need not strictly observe that day, it must be clearly made out that the transaction is really one by way of mortgage, a matter not always perfectly clear. Sometimes there may really be a transaction whereby A conveys

[1] See also *Liquidation Estates Purchase Company* v. *Willoughby* (1898), A. C., 321; 67 L. J., Ch., 251; 78 L. T., 329; *Gifford* v. *Fitzhardinge* (1899), 2 Ch., 32; 68 L. J., Ch., 529; 81 L. T., 106.

[2] *Re Pride, Shackell* v. *Colnett* (1891), 2 Ch., 135; 61 L. J., Ch., 9; 64 L. T., 768.

[3] Fisher on Mortgages, 734; Coote on Mortgages, 1467.

property to B, say for £1,000, reserving to himself a right to buy it back by a given date, say for £1,100. Now, here the question would arise, is this a mortgage, or is it not an out-and-out sale with a right of re-purchase on a given day? If the former, then the principles we have referred to apply; but, if the latter, then they have no application, and the day named must be rigidly adhered to, and there is no principle upon which the Court can allow to the conveying party an extension of his privilege of re-purchase beyond the day named. There being but little difference from a mortgage in the form of such instruments, it is sometimes necessary to look to surrounding circumstances, to ascertain the real nature of the transaction; and the following circumstances will form more or less cogent evidence, to show that it was really intended as a mortgage, and not as an out-and-out sale, viz.: (1) That the conveying party was allowed to remain in possession, merely accounting for rents as an equivalent to interest. (2) That though the party to whom the property was conveyed was let into possession, he accounted for the rents and profits to the conveying party. (3) That the conveying party paid the whole costs of the instrument. (4) That the money paid was utterly inadequate to what would be fair purchase-money for the property. Parol evidence is also admissible on the point.[1]

Circumstances showing transaction really a mortgage.

Instruments of the kind mentioned in the last paragraph are now very common in transactions with insurance companies. The company very often, instead of lending, will buy a reversion, giving the reversioner the right to re-purchase, say within five years, on payment of such a sum as will represent the amount originally paid, with compound interest, and the premiums on any policy of assurance effected

Transactions with insurance companies.

[1] Story, 668; 2 Wh. & Tu., 24-30.

for the purposes of the transaction, with like interest thereon. The advantage in a transaction of this kind is that the person raising the money will have no interest or premium to pay, and, during the period, he still has the right of getting the property back, an advantage he would not be slow to avail himself of if the reversion became an estate in possession. A transaction of this kind is clearly not a mortgage, and the point of evidence numbered (3) in the last paragraph would not assist in an effort to make it out to be so.

The reason of the doctrine of the Court.

The whole idea of the Court of Chancery in continually allowing to the mortgagor the right or equity of redemption embraces the doctrine of the objection of the Court to penalties. The Court, in fact, has always regarded the naming of a day by which, if the money is not paid, the estate is to be the mortgagee's absolutely, as a penalty. Though this was reasonable enough in some respects, the idea has probably been carried too far. Thus, it was formerly laid down that a provision in a mortgage deed to the effect that if interest was not punctually paid it should be converted into principal, and added to the mortgage debt, so as itself to carry interest —in other words a provision for compound interest —partook of the nature of a penalty, and could not be enforced. This, however, cannot now be considered to be the law, it having, in a modern case, been distinctly held that a provision in a mortgage deed for such capitalisation of interest to become in arrear is not contrary to any rule of Equity, and will be given effect to.[1] The provision is, in fact, not a penalty, but a fair stipulation for compensation to the mortgagee for not being punctually paid his interest.

Conversion of interest into principal.

[1] *Clarkson* v. *Henderson*, 14 Ch. D., 348; 49 L. J., Ch., 289. See also 2 Wh. & Tu., 18, 19; Fisher on Mortgages, 866, 867; Coote on Mortgages, 141, 142.

Provision for increasing amount of interest.

Again, it has been held that a provision that if interest is not punctually paid it shall be increased, cannot be enforced, as really being a provision in the nature of a penalty.[1] Thus, to reserve £5 per cent. interest, making it £6 per cent. if it is not paid within a certain time of its becoming due, has been held bad; and yet the same idea can undoubtedly be satisfactorily carried out by reserving £6 per cent. reducible to £5 per cent. if paid within, say, fourteen days of becoming due. It is, however, submitted that a different decision would probably now be come to, at any rate, if the increase was but a slight or reasonable one, as this might, equally as compound interest, be viewed as compensation for non-payment of the interest at the proper time[2]; and, besides, it has been held that the fines and penal payments contained in mortgages to building societies are recoverable in full,[3] and there does not seem to be much, if any, difference between the two cases. It is, in fact difficult, if not impossible, to see any distinction in principle between providing for a reasonable increase of interest, and providing for capitalisation of interest, if it is not duly paid.

The modes of effecting mortgages.

A mortgage of freeholds is effected by an ordinary deed of conveyance, reserving the right of redemption on a day (usually) six months from the date of the instrument. It is not in practice contemplated that this day will be observed, and the mortgage deed therefore invariably contains a provision for future payment of interest. A mortgage of copyholds is usually effected by a conditional surrender, accompanied by a deed containing the ordinary mortgage

Mortgage of copyholds.

[1] 2 Wh. & Tu., 266, 316; Fisher on Mortgages, 871; Coote on Mortgages, 137.

[2] See in support of this view, *General Credit and Discount Company* v. *Glegg*, 22 Ch. D., 549; 52 L. J., Ch., 297; 48 L. T., 182; *Clarkson* v. *Henderson*, 14 Ch. D., 348; 49 L. J., Ch., 289.

[3] *Protector Endowment Company* v. *Grice*, 5 Q. B. D., 592; 49 L. J., Q. B., 812.

covenants, and the mortgagee is not admitted on the conditional surrender unless he wishes to enforce his security. A mortgage of leaseholds may be effected by assignment or underlease, but the latter is the preferable plan, because thereby the mortgagee is in no way connected with the lessor of the property; there is, in fact, no privity of estate between them, and the mortgagee is not liable in respect of the rent and covenants reserved in the lease.[1] A mortgage of property, be it freehold, copyhold, or leasehold, may, besides being effected in any of the foregoing direct ways (which are called legal mortgages), be effected by way of equitable mortgage, that is, by a memorandum of charge on the property, without any direct conveyance, or even by a deposit of the muniments of title, either simply, or accompanied by a memorandum. That a mere deposit of deeds should create a charge on land, may, at first sight, appear strange, bearing in mind the provisions of the 4th section of the Statute of Frauds,[2] but the point was decided long ago in the well-known case of *Russel* v. *Russel*.[3] The theory is that there has been a part performance of the contract sufficient to take the case out of the Statute,[4] and further that the deposit creates a security as a matter of necessity, for, if the depositor sued at law to recover back his muniments, the lien of the depositee thereon would be an answer, and if he sued in Equity for their specific delivery up, he would be met with the maxim, "He who seeks Equity must do Equity"; and it certainly would not be equitable or right to order their restoration to him without payment of the money to secure which they were deposited. The depositor of the deeds, therefore, could in no way get them back without

Mortgage of leaseholds.

Equitable mortgage.

Russel v. *Russel*.

[1] See Indermaur & Thwaites' Conveyancing, 428-430.
[2] 29 Car. II, c. 3.
[3] 2 Wh. & Tu., 76.
[4] *Ibid.*, 78; as to part performance, see *post*, pp. 283-287.

repaying the money for which they were deposited. But where there is no deposit, and no writing, no merely oral statement or direction can constitute a valid charge on the property.[1]

Welsh mortgage.

One peculiar, and out-of-the-way, mortgage may also be noticed, viz.: what is known as a Welsh mortgage, which is a transaction whereby the estate is conveyed to the mortgagee, who is to go into possession and take the rents and profits as an equivalent for his interest, the principal remaining undiminished. In such a transaction there is no contract, express or implied, between the parties, for the repayment of the debt at a given time, and though the mortgagee has no remedy by action to enforce payment of his money, yet the mortgagor or his heirs may redeem at any time.[2]

Position of mortgagor improved by legislation.

The position of a mortgagor has been greatly ameliorated, and improved, by modern legislation, for originally at Common Law his position was scarcely recognised as being any longer that of owner of his property. The Courts of Common Law, in fact, simply considered that, whilst allowed by the mortgagee to remain in possession, he might take any crops or profits of the land without accounting to the mortgagee, and he might distrain for rent, but this was all. The Judicature Act 1873,[3] however, ameliorated this harsh rule of the Common Law by providing that a mortgagor—entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of intention to enter has been given by the mortgagee—may sue for the possession of such premises, or for the recovery of such rents and profits, or to prevent

Provision of Judicature Act 1873, sec. 25 (5).

[1] *Ex parte Broderick, Re Beetham*, 18 Q. B. D., 766; 56 L. J., Q. B., 635; 35 W. R., 613.
[2] Fisher on Mortgages, 7.
[3] 36 & 37 Vict., c. 66, sec. 25 (5).

or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises on a lease or other contract made by him jointly with some other person. The mortgagor also, at Common Law, having parted with the legal estate, could not make any valid lease of the mortgaged property; and any lessee claiming under a lease made by an owner, after he had mortgaged his estate, was liable to be ejected by the mortgagee, in which event, however, that lessee could redeem the mortgage.[1] Any lease had, in fact, to be made by the mortgagor and mortgagee together, the rent being reserved to the mortgagee until redemption, and then to the mortgagor. The Conveyancing Act 1881[2] has now improved the mortgagor's position in this respect, for it enacts that, if a mortgage made by deed since 1881 does not otherwise provide, the mortgagor in possession can make leases as follows, viz.: An agricultural or occupation lease for not exceeding twenty-one years, and a building lease for not exceeding ninety-nine years, such leases to take effect within a year, to be at the best rent, without fine, and to contain usual covenants, and a condition for re-entry on non-payment of rent for not exceeding thirty days. The mortgagor must also within one month of making such a lease, deliver to the mortgagee, or where more than one, then to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee is not to be concerned to see that this provision is complied with,[3] though the power of sale arises immediately if it is not.[4]

Position as to making leases of mortgaged property.

Conveyancing Act 1881.

Limitations on mortgagor's right to redeem.

We have stated that the mortgagor has by the

[1] *Keech* v. *Hall*, 1 Smith's Lead. Cases, 494; *Tarn* v. *Turner*, 39 Ch. D., 456; 57 L. J., Ch., 1085; 59 L. T., 742.

[2] 44 & 45 Vict., c. 41, sec. 18.

[3] See further Indermaur & Thwaites' Conveyancing, 445-447.

[4] 44 & 45 Vict., c. 41, sec. 20 (iii).

doctrines of the Court of Chancery a continuous right or equity of redemption; but this right is limited (1) by the Statute of Limitations, and (2) by the mortgagee's remedy of foreclosure. The Real Property Limitation Act 1874[1] provides that where a mortgagee of land enters into possession, and holds for a period of twelve years without giving any signed acknowledgment of the mortgagor's rights, his title is absolute, and the mortgagor is barred from any further right or equity of redemption; and it has been decided that, in this case, there is no further extension of time in the case of disability, but that the mortgagor's right is absolutely lost after the period of twelve years.[2] The mortgagor, desiring to redeem, tenders to the mortgagee "the price of redemption," *i.e.*, his principal, interest, and costs, and, if not accepted, then he may commence an action in the Chancery Division for redemption. In such an action an account is taken of what is due to the mortgagee for principal, interest, and costs, and, on payment of this total amount, the mortgagee must reconvey to the mortgagor. It is a common expression "You foreclose down, and redeem up." This means that a first mortgagee can foreclose, or shut out, all other persons interested in the property, but if he is not a first mortgagee he can only foreclose the subsequent mortgagees and the mortgagor, and may redeem any prior incumbrancers; whilst a mortgagor must redeem all mortgages.

Forster v. *Patterson.*

Price of redemption.

"Foreclose down, redeem up."

Not only may the original mortgagor redeem the mortgaged property, but, as a general rule, any person interested in the equity of redemption may do so, *e.g.*, a tenant by the curtesy, a tenant in dower, a jointress, a judgment creditor who has registered

Who may redeem besides the mortgagor.

[1] 37 & 38 Vict., c. 57, sec. 7.
[2] *Forster* v. *Patterson*, 17 Ch. D., 132; 50 L. J., Ch., 603; 44 L. T., 465; Fisher on Mortgages, 678.

his execution under the Land Charges Act 1900, a surety for the mortgage debt, a life tenant of the mortgaged estate,[1] and even a tenant for years whose tenancy is not binding on the mortgagee.[2] A tenant for life has the option to redeem in preference to a remainderman.[3] But a person having no right or interest in the mortgaged estate cannot redeem, *e.g.*, a mere annuitant of the mortgagor.[4] A mortgagee is bound to take due care of the title deeds of the mortgaged property, including the mortgage deed, and all the deeds must be handed over to the mortgagor, or other person properly redeeming. If any deed has been lost, the mortgagor, or such other person, is entitled to have a proper indemnity in respect of the lost deed, at the cost of the mortgagee.[5]

Mortgagee must take care of the deeds.

Non-observance of day named in mortgage for payment.

There is, in every mortgage, a day named for payment by the mortgagor, and if he does not observe that day, then he is not entitled at any moment to come forward and pay the money with interest to date, but he must give six months' notice of his intention to repay, or in lieu thereof pay six months' interest[6]; and, if having given such a notice he does not then strictly observe the day for payment, the mortgagee is entitled to a fresh six months' notice, or six months' interest in lieu of notice.[7] This is so that the mortgagee may have proper opportunity of finding another security for his money. But this does not apply to an equitable mortgage by deposit of deeds, nor to any equitable mortgage intended as a

Fitzgerald's Trustee v. *Mellersh.*

[1] Story, 672; Fisher on Mortgages, 681; Coote on Mortgages, 712-719.
[2] *Tarn* v. *Turner*, 39 Ch. D., 456: 57 L. J., Ch., 1085; 59 L. T., 742.
[3] *Prout* v. *Cock* (1896), 2 Ch., 888; 66 L. J., Ch., 24; 75 L. T., 409.
[4] Story, 672.
[5] *James* v. *Rumsey*, 11 Ch., D., 398; 48 L. J., Ch., 345.
[6] *Johnson* v. *Evans*, 61 L. T., 18; *Smith* v. *Smith* (1891), 3 Ch., 550; 60 L. J., Ch., 694; 65 L. T., 344.
[7] *Bartlett* v. *Franklin*, 15 W. R., 1077; 36 L. J., Ch., 671.

mere temporary security, for it has been held that all such a mortgagee is entitled to, in the way of notice, is a reasonable time to look up the deeds.[1]

Who reconveys on death of mortgagee.

If a legal mortgagee is dead, and the property is freehold or copyhold, formerly it was not always perfectly easy to determine who should re-convey to the mortgagor, nor is it always easy now to determine the point as regards copyholds to which the mortgagee has been admitted tenant on the Court Rolls. In the absence of any devise of the mortgaged property, the rule was, that whilst the mortgagor must pay his money to the personal representatives of the mortgagee, the heir of the mortgagee was the person to reconvey, but if there was any devise of the mortgaged property, then the devisee was the proper person to reconvey. Difficulties often arose as to whether there had been a devise of the mortgaged property, for it was held that under a general devise mortgaged property would pass, unless a contrary intention was shown[2]; but it was by no means easy to determine whether there was a contrary intention or not, for instance, supposing the property comprised in the general devise was charged with payment of debts, or was subjected to a series of complicated limitations, here there was usually held to be a sufficient contrary intention. The Vendor and Purchaser Act 1874,[3] however, provided that in all cases the legal personal representative of the mortgagee might re-convey, but it was strangely enough held that this enactment, though applying to a re-conveyance to the mortgagor, did not operate to enable the personal representative

Provision of Vendor and Purchaser Act 1874.

[1] *Fitzgerald's Trustee* v. *Mellersh* (1892), 1 Ch., 385; 61 L. J., Ch., 231; 66 L. T., 178. See also Fisher on Mortgages, 715; Coote on Mortgages, 729.

[2] *Lord Braybrooke* v. *Inskip*, Tudor's Lead. C. Convyg., 986.

[3] 37 & 38 Vict., c. 78, sec. 4.

Provision of Conveyancing Act 1881.

to transfer.[1] However, the Conveyancing Act 1881 [2] (which repealed the provision just mentioned) met all cases by enacting that the mortgaged property should, on death of the mortgagee, always go to his personal representatives, notwithstanding any testamentary disposition, and that they should have all powers both of re-conveyance and transfer, and should be deemed, for the purposes of that enactment, the heirs and assigns of the deceased. One would have thought that this was a satisfactory provision, but the Legislature has, with regard to copyholds, thought differently, for, firstly, by the Copyhold Act, 1887,[3] and now by the Copyhold Act, 1894,[4] it is enacted that the 30th section of the Conveyancing Act 1881, shall not apply to land of copyhold or customary tenure, vested in the tenant on the Court Rolls of any manor, upon any trust or by way of mortgage. This provision dates from the 16th September, 1887, and, therefore, as regards all cases of payments off since that date, of mortgages of copyhold property to which the mortgagee has been admitted, it is either the customary heir or devisee, as the case may be, who will re-surrender to the mortgagor, and the old law is, therefore, to this extent revived. This matter, as regards trust property, has already been dealt with in this work.[5] Of course, if the mortgagee of copyholds has not been admitted, all that is necessary is to pay the money to his personal representatives on their receipt, and enter up satisfaction on the Court Rolls; and, as regards equitable mortgages, equally, of course, all that is required is a receipt, there being no estate to reconvey.

Copyhold Acts 1887 and 1894.

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[1] *Re Spradbery's Mortgage*, 14 Ch. D., 514; 49 L. J., Ch., 623.
[2] 44 & 45 Vict., c. 41, sec. 30.
[3] 50 & 51 Vict., c. 73, sec. 45.
[4] 57 & 58 Vict., c. 46, sec. 88.
[5] See *ante*, pp. 74, 75, and see *Re Mills' Trust*, 37 Ch D., 312 7 L. J., Ch., 466; 58 L. T., 620.

Right on payment off of mortgage to require debt to be assigned.

But, though a mortgagor was always entitled to a reconveyance of the property, or to have it transferred to his nominee, he was not formerly entitled to call upon the mortgagee to assign the mortgage debt itself, for the debt is a chose in action, and was only assignable at law by means of a power of attorney to the assignee to sue in the mortgagee's name, and it was not reasonable that a mortgagee should have cast upon him the risk of liability for costs in any action brought for the debt in his name. But when the Judicature Act 1873[1] made choses in action assignable by way of absolute assignment, this reasoning no longer held good, and by the Conveyancing Act 1881,[2] as amended by the Conveyancing Act 1882,[3] it is provided that, in the case of all mortgages, the mortgagee shall, on payment, be bound, if required, not only to reconvey or transfer the mortgaged property, but also to assign the mortgaged debt; but a requisition for its assignment by an incumbrancer prevails over the requisition of the mortgagor, and as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer.

Mortgagee may become absolute owner.

We have seen that the mortgagee holds the estate which is conveyed to him, simply as a security for his money, that being the real nature of the transaction, but the property may become his absolutely, as already noticed, either by force of the Statute of Limitations, or by foreclosure. The mortgagee at first is not let into possession of the property, though, strictly speaking, having the legal estate conveyed to him, he is entitled to possession. Still, there is naturally no need for him immediately to take

[1] 36 & 37 Vict., c. 66, sec. 25 (6).
[2] 44 & 45 Vict., c. 41, sec. 15.
[3] 45 & 46 Vict., c. 39, sec. 12.

possession, and in practice he never does so, for, if the money is paid when required, that is all he can want; but, assuming it is not, then we have to consider his remedies, and there are several, all of which he may, if he pleases, exercise concurrently. These remedies are chiefly as follows:—(1) To sue for his money; (2) To enter into possession and eject the mortgagor, and then also he has certain other incidental powers; (3) To sell either under express powers conferred by the mortgage deed, or given by statute; (4) To foreclose.

Mortgagee may exercise remedies concurrently.

Any proceedings by the mortgagee of land to enforce his security, or to recover his money, must now be brought within twelve years, under the provisions of the Real Property Limitation Act 1874[1]; but this provision does not apply to a mortgage of pure personalty, *e.g.*, of a reversionary interest in money, as to which the time to sue is still twenty years if the mortgage is under seal, and six years if it is not.[2] A mortgagee of land must sue within the period of twelve years even though, apart from the mortgage, there is a collateral bond by the mortgagor[3]; but if there is a collateral bond by a third person[4] or even if such a third person is joined as surety in the mortgage deed itself,[5] then, as against such third person, an action on the covenant may be brought within twenty years. The period of twelve years runs from the date of the mortgage money becoming due, or from the

Mortgagee must sue within twelve years.

Sutton v. *Sutton*.

Fearnside v. *Flint*.

Re Frisby.

[1] 37 & 38 Vict., c. 57, sec. 7; *Sutton* v. *Sutton*, 22 Ch. D., 511; 52 L. J., Ch., 333; 48 L. T., 95; Brett's Eq. Cas., 244.

[2] *Mellersh* v. *Brown*, 45 Ch. D., 225; 60 L. J., Ch., 43; 63 L. T., 189.

[3] *Fearnside* v. *Flint*, 22 Ch. D., 579; 52 L. J., Ch., 479; 48 L. T., 154; *Kirkland* v. *Peatfield* (1903), 1 K. B., 756; 72 L. J., K. B., 355; 88 L. T., 472.

[4] *Re Powers*, *Lindsell* v. *Phillips*, 30 Ch. D., 291; 53 L. T., 647.

[5] *Re Frisby*, *Allison* v. *Frisby*, 43 Ch. D., 106; 59 L. J., Ch., 94; 61 L. T., 632. Mr. Justice Kay did so decide in *Re Frisby*, *Allison* v. *Frisby* (90 L. T., 922). In the Court of Appeal, the substantial decision of Mr. Justice Kay was affirmed, but on this point there was a difference of opinion. Lord Justice Bowen followed Mr. Justice Kay, Lord Justice Cotton did not, and Lord Justice Fry expressed no opinion on the point.

last signed acknowledgment, or payment of interest, or part payment of principal by the mortgagor. And where there is a mortgage of land, and there is a surety for the debt, an acknowledgment, or payment of interest, or part payment of principal, made by the mortgagor, will keep the debt alive as regards the surety; for, although under the provisions of Lord Tenterden's Act,[1] and the Mercantile Law Amendment Act 1856,[2] a co-debtor is not to lose the benefit of the Statute of Limitations by reason of acknowledgment, or part payment, or payment of interest, made by another co-debtor, yet there is no similar provision saving the benefit of the Real Property Limitation Act 1874.[3] Where a mortgagor assigns his equity of redemption, but yet continues to pay interest to the mortgagee on his own account, and for his own purposes, and not as agent for the assignee of the equity of redemption, such payment does not prevent the Statute of Limitations running in favour of the assignee, and against the mortgagee, so as to bar him from all further claim against the mortgaged property[4]; but where a mortgagor made a settlement of his equity of redemption, and the tenant for life afterwards paid the interest, it was held that such payment was sufficient to prevent the statute barring the mortgagee.[5]

Newbould v. *Smith.*

As soon as the mortgage is created, the mortgagee, in the absence of any stipulation to the contrary, may immediately enter on the lands, but will be bound to restore them upon performance of the condition by payment of the money on the day

Mortgagee entering into possession.

[1] 9 Geo., IV., c. 14, sec. 1.
[2] 19 & 20 Vict., c. 97, sec. 14.
[3] 37 & 38 Vict., c. 57. *Re Frisby*, *Allison* v. *Frisby*, *ante*, p. 202.
[4] *Newbould* v. *Smith*, 14 App. Cas., 423; 61 L. T., 814, affirming the decision of the Court of Appeal, 33 Ch. D., 127; 55 L. J., Ch., 788.
[5] *Dibb* v. *Walker* (1893), 2 Ch., 429; 62 L. J., Ch., 536; 68 L. T., 610. See also *Bradshaw* v. *Widdrington* (1902), 2 Ch., 430; 71 L. J., Ch., 627; 86 L. T., 726.

named in the deed; but, of course, as has already been pointed out.[1] practically a mortgagee does not enter until default is made, it not being ever meant that he should, nor in any way necessary for his protection. If a mortgagee can obtain peaceable possession, he may do so without any action of ejectment, but if he cannot, then such an action is necessary. Once in possession, the mortgagee may take the rents and profits, but must always be prepared to account for them, and he is liable indeed, not only for everything that he actually receives, but also for everything that he might, but for his default or conduct, have received. Thus, in one case, a brewer held a mortgage of a public house, and he took possession under such mortgage, and then let the property to a tenant at a rent of £60 per annum, a condition of the tenancy being that the tenant should be bound to take all malt liquors from the landlord, the mortgagee. The Court of Appeal held, that as the house might have been let at a higher rent as a "free house"—*i.e.*, without the stipulation binding the tenant to take his malt liquors from the landlord—the mortgagees must be charged with such higher rent.[2] If a mortgagee goes into possession, and then transfers his mortgage to another without the assent of the mortgagor, he will be held liable to account for the profits received, or which ought to have been received, even subsequently to the transfer, upon the principle that, having ejected the mortgagor, it was incumbent on him to take care in whose hands he placed the property.[3] And a mortgagee who has once taken possession of the mortgaged property is unable to go out of possession again without his

Mortgagee in possession must account for rents.

White v. *City of London Brewery Company.*

Mortgagee in possession cannot go out.

[1] *Ante*, p. 201.

[2] *White* v. *City of London Brewery Company*, 42 Ch. D., 257; 58 L. J., Ch., 855; 38 W. R., 82; 61 L. T., 741.

[3] Fisher on Mortgages, 833.

mortgagor's consent, and is liable for any loss incurred by his attempting to do so, for having chosen to take upon himself the burden of possession, he must abide by it.[1]

As to annual rests.

The usual position of a mortgagee in possession is, that he receives the rents and applies them in payment of costs and interest. He must also, out of any surplus remaining, do any necessary repairs. He is then ordinarily entitled to accumulate any ultimate balances of rent, until he has thus collected enough to pay himself off in one lump sum, for he cannot be compelled to take payment of his principal, little by little, by means of the surplus rents in his hands from time to time, and thus give the mortgagor the benefit of a proportionate abatement of interest; that is to say, no annual or other rests will ordinarily be made for this purpose.[2] But this rule only applies where the mortgagee has entered not merely to get payment of his principal, but because his interest was in arrear, or it was necessary to enter for the protection of the property, *e.g.*, if it were a mortgage of leaseholds, and he entered to prevent a forfeiture for breach of covenant. The argument is that as he has been compelled to enter for his own protection by reason of a default of the mortgagor other than payment of principal, it would be unjust to visit him with the inconvenience of receiving payment off in this gradual manner.

When annual rests will be made.

But if no interest was in arrear at the time the mortgagee entered, and there was no other special reason for his entering, then, as he must have entered wholly with a view to getting paid his principal, which payment could only be in a gradual way as the rents came in, he has shown his

[1] *Re Prytherch*, *Prytherch* v. *Williams*, 42 Ch. D., 590; 59 L. J., Ch., 79; 61 L. T., 799.

[2] Per Warrington, J., in *Wrigley* v. *Gill*, 74 L. J., Ch., at p. 116.

willingness thus to receive payment by driblets, and annual rests will be made—that is, a yearly balance will be struck, and any surplus after payment of costs and interest will, from time to time, be applied in reduction of principal, which will produce a corresponding abatement of interest.[1] If a mortgagee in possession sells part of the property, a rest must be taken in the accounts, as the purchase money must be credited to the mortgagor in the account of principal and interest at the date on which it is received, but no rest is to be made in the account of rents and profits which runs straight on.[2]

Rest on a sale.

What a mortgagee may add to his mortgage debt.

A mortgagee in possession is entitled to add to his mortgage debt, and recover from the mortgagor, any costs properly, or reasonably, incurred in relation to the mortgage debt,[3] any money he may have properly expended in maintaining his title, any sums properly paid for insurance, or for renewing renewable leaseholds, and any money expended in necessary repairs. But he may not add to his principal, money expended in general improvements, for he has no right to make the estate more expensive and difficult for the mortgagor to redeem than is necessary.[4]

Shepard v. *Jones.*

However, it has been decided that if a mortgagee in possession, or a mortgagee selling under a power of sale, has reasonably expended money in permanent works on the property, he is entitled in any redemption or foreclosure suit, on *primâ facie* evidence to that effect, to an enquiry as to whether the outlay has increased the value of the property. If it has done

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[1] Story, 664, 665; Fisher on Mortgages, 850; Coote on Mortgages, 1227-1231.

[2] *Wrigley* v. *Gill* (1905), 1 Ch., 241; 74 L. J., Ch., 160; 92 L. T., 491; *Ainsworth* v. *Wilding* (1905), 1 Ch., 435; 74 L. J., Ch., 256; 92 L. T., 679.

[3] *National Provincial Bank of England* v. *Games*, 31 Ch. D., 582; Brett's Eq. Cas., 229.

[4] Fisher on Mortgages, 843-845.

so, his expenditure will be allowed so far as it has increased the value, and in such case it is immaterial whether the mortgagor had notice of the expenditure or not.[1] The principle of this decision appears to be that, though the mortgagee could not sue the mortgagor for the money spent in improvements, yet, as the mortgagor's right of redemption is of a purely equitable nature, the Court can, in the exercise of its powers, refuse to allow him to redeem without paying for what has produced an increase in the value of the property, for "He who seeks Equity must do Equity."

Leases by mortgagee.

A mortgagee in possession may make leases similar to those already mentioned as capable of being made by a mortgagor in possession under the provisions of the Conveyancing Act 1881.[2] Formerly, he could, in the absence of express power, make no satisfactory leases, for the tenancies would end, as regarded the mortgagor, on redemption by him. By the Conveyancing Act 1881, also, it is provided[3] that a mortgagee in possession may cut and sell timber ripe and fit for cutting, and not planted for shelter or ornament, any such sale to be completed within twelve months from the making of any contract of sale. Before this enactment, a mortgagee could only fell timber when his security was insufficient, and this, of course, he can still do, quite irrespective of the Conveyancing Act 1881, if such is the case, assuming, of course, that his mortgagor had himself power to commit waste.

Mortgagee cutting timber

Statutory power of sale

It is not now usual to insert in mortgages an express power of sale, ample power being conferred by the Conveyancing Act 1881,[4] which provides

[1] *Shepard* v. *Jones*, 21 Ch. D., 469.
[2] *Ante*, p. 196.
[3] 44 & 45 Vict., c. 41, sec. 19.
[4] Secs. 19-22.

that in the case of mortgages made since the Act, the mortgagee shall, when the principal money becomes due, have a power of sale in the ordinary way; but such power is not to be exercised unless default in payment for three months after service[1] of a notice to pay, or unless interest is in arrear for two months, or unless there is a breach by the mortgagor of some other provision in the mortgage deed, or in the Act. A mortgagee in selling is not considered to occupy any fiduciary relationship towards his mortgagor, or subsequent mortgagees, which will necessitate him specially studying their interests, as is the case when a trustee sells his *cestui que trust's* property.[2] He is not a trustee of the power of sale, for such power is given to him for his own benefit, and if he thinks it right to realize his security, and he gives any necessary notices, and does what he fairly can to realize a good price, the Court cannot interfere, and his motives in realizing are quite immaterial.[3] There is nothing to prevent a mortgagee selling to his mortgagor, or one of several mortgagors[4]; but a sale to a sole mortgagor does not defeat the rights of any subsequent mortgagee in the equity of redemption.[5] If a mortgagee sells to one of his mortgagors, without the consent of the co-mortgagors, for the exact amount of principal, interest and costs, the sale is good, if *bonâ fide*, and the mortgagor who purchases is not accountable to his co-mortgagors for any profits arising from his so purchasing.[6] But if a mortgagee acts manifestly improperly, or improvidently, as by selling the

Mortgagee's position in selling.

Mortgagee selling to mortgagor.

Kennedy v. *De Trafford.*

[1] See sec. 67 of the Act, as to how notices under it may be served; or Indermaur & Thwaites' Conveyancing, 462.

[2] See *ante*, p. 81.

[3] *Nutt* v. *Easton* (1900), 1 Ch., 29; 69 L. J., Ch., 46; 81 L. T., 530.

[4] *Kennedy* v. *De Trafford* (1897), A. C., 180; 66 L. J., Ch., 413; 76 L. T, 247.

[5] *Otter* v. *Lord Vaux*, 26 L. J., Ch., 128. See also *ante*, p. 190.

[6] *Kennedy* v. *De Trafford* (1897), A. C., 180; 66 L. J., Ch., 413; 76 L. T., 427.

mortgaged property either to a mortgagor or anyone else for just sufficient to cover his principal, interest, and costs, quite independently of its true value, then he may be liable [1]; and if he is guilty of some serious blunder or wrong-doing with regard to the property, which causes a large diminution in its price, he will be liable for that.[2] Money received from any sale by the mortgagee, is applied in discharging prior incumbrances, then all costs of sale, then the particular mortgage debt and interest, then any subsequent incumbrances, and, lastly, any balance is paid to the mortgagor, or other person entitled to the ultimate equity of redemption.[3] With regard to any balance on a sale, the mortgagee is a constructive trustee for the mortgagor, or other person entitled to it, and if he does not promptly pay it over, he will be liable to interest thereon unless there is some reasonable excuse for his failure to do so [4]; and where he cannot ascertain who is the party entitled to the surplus, he ought to invest the same in some proper trustee investment, and if he fails to do so, he will, like a trustee who neglects to invest trust moneys, be liable to interest from the time of the completion of the sale.[5] The mortgagee can only plead the Statute of Limitations as a defence to any action by the mortgagor, or other person entitled, for such balance, in the same cases as any other trustee can do under the Trustee Act 1888.[6]

How sale moneys applied.

Foreclosure consists of proceedings taken by the Foreclosure.

[1] *Colson* v. *Williams*, 58 L. J., Ch., 539; 61 L. T., 71.
[2] *Tomlin* v. *Luce*, 43 Ch. D., 191; 59 L. J., Ch., 164; 62 T. T., 18.
[3] 44 & 45 Vict., c. 41, sec. 21 (3). The entire surplus may be safely paid to a second mortgagee, sec. 22.
[4] *Eley v. Read*, 76 L. T., 39.
[5] *Charles* v. *Jones*, 35 Ch. D., 544; 56 L. J., Ch., 745; 56 L. T., 848. The rate was formerly held to be 4 per cent., but probably now it would be held to be 3 per cent. (*Rowlls* v. *Bebb* (1900), 2 Ch., 107 69 L. J., Ch., 562; 82 L. T., 633); see *ante*, p. 99.
[6] *Thorne* v. *Heard* (1895), A. C., 495; 64 L. J., Ch,, 652; 73 L. T., 291.

mortgagee against the mortgagor, and any subsequent mortgagees, for the purpose of shutting them out from any further right or equity of redemption. The proceedings are taken in the Chancery Division by action, or by originating summons[1]; or, if the mortgage does not exceed £500,[2] the proceedings may be taken either in the Chancery Division, or in the District County Court. In the foreclosure proceedings an account is taken by the Court of what is due to the mortgagee for principal, and interest, and costs and expenses properly incurred by the mortgagee in relation to the security since the date of the mortgage,[3] and the costs of the foreclosure proceedings; and a day is named, usually six months from the date of the Master's certificate, for payment; and even though the defendants to the foreclosure suit are the mortgagor and subsequent mortgagees, the rule is the same, viz., to give but one period for redemption by any of them, and not to allow successive periods of redemption for each.[4] If the amount certified is not paid by the prescribed time, then the mortgagor, and other persons interested in the equity of redemption, are foreclosed, or shut out, and the mortgagee is at last the absolute owner,[5] subject to the Court's discretionary power to re-open the foreclosure on special grounds, *e.g.*, ignorance of the state of the proceedings, or the day fixed for payment, irregularity in the proceedings, illness, or accidental

When the Court will re-open a foreclosure.

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[1] Order LV., rule 5a.

[2] 51 & 52 Vict., c. 43, sec. 67.

[3] But not the costs of negotiating loan, investigating title, and preparing and completing the mortgage, *Wales* v. *Carr* (1902), 1 Ch., 860; 71 L. J., Ch., 483; 86 L. T., 288.

[4] *Tufnell* v. *Nicholls*, 56 L. T., 152; *Smithett* v. *Hesketh*, 44 Ch. D., 161; 59 L. J., Ch., 567; 62 L. T., 802. See Coote on Mortgages, 1048-1050.

[5] In the case of receipt of rent between the date of the Master's Certificate and the foreclosure being made absolute, a further account will be directed, and a further time (usually a month) given to the mortgagor to redeem, *Jenner-Fust* v. *Needham*, 32 Ch. D., 582; 55 L. J., Ch., 629; 55 L. T., 37.

inability to travel on the part of the person who should have paid the money, or even temporary poverty on the part of such person. And the Court may thus interfere even against a purchaser if he has bought shortly after the foreclosure decree, and with notice of anything which would affect the mortgagee's right to an absolute title under the order. But, for the Court to interfere at all, the applicant must seek relief with reasonable promptness, having regard to the nature of the property, and other circumstances.[1]

When foreclosure should be resorted to.

However, foreclosure is not a course usually adopted by a legal mortgagee, as sale is in most cases preferable; but there may be cases in which it is best to proceed to foreclose, *e.g.*, where the mortgagee has a scanty security, but thinks he may, as absolute owner, work it out advantageously, as, by building on the land, or making improvements, things that he could not safely do in his capacity of mortgagee. In the case, also, of an equitable mortgage by deposit of deeds, foreclosure is, indeed, the proper and only remedy against the land[2]; but if the deposit is accompanied by a memorandum of agreement to execute a legal mortgage, then the mortgagee's action may, at his option, be either for foreclosure, or for sale.[3] It may also be noticed that in any foreclosure or redemption suit (which includes a suit brought by an equitable mortgagee by deposit of deeds[4]) the Court has, under the Conveyancing Act 1881,[5] full power, in its discretion, to direct a sale on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum to meet the expenses of sale, and to secure the

Remedy of equitable mortgagee.

[1] Fisher on Mortgages, 931, 932; 2 Wh. & Tu., 53, 54; Coote on Mortgages, 1068-1073.

[2] *James* v. *James*, L. R., 16 Eq., 153; 42 L. J., Ch., 386: 21 W. R., 522; *Re Hodson & Howe's Contract*, 35 Ch. D., 668; 56 L. J., Ch., 555; 56 L. T., 83.

[3] *York Union Bank* v. *Artley*, 11 Ch. D., 205: 27 W. R., 704.

[4] *Oldham* v. *Stringer*, 51 L. T., 895; 33 W. R., 251

[5] 44 & 45 Vict., c. 41, sec. 25.

performance of the terms.[1] Thus, suppose that, in a foreclosure suit, a mortgagor urges that a sale should be ordered, and the mortgagee objects, alleging that his security is scanty, and that it will be useless to offer the property for sale, the Court might here comply with the mortgagor's request, on the condition that he brought into Court a sufficient sum to meet the probable costs of putting the property up for sale. However, the Court is not bound to direct a sale merely because the party requesting it offers to bring money into Court to cover costs.[2]

Mortgagee's power to appoint a receiver, and to insure.

Other incidental powers of a mortgagee are, to appoint a receiver, and to insure, both of which powers are conferred by the Conveyancing Act 1881.[3] The mortgagee's power of appointing a receiver arises as soon as the principal money is due and he is entitled to exercise his power of sale. Such receiver is considered the agent of the mortgagor, but has to deal with the money he receives thus :— (1) In discharging rents, rates, outgoings, &c. ; (2) In keeping down all annual or other payments, and the interest on any principal sums, having priority ; (3) In payment of his commission, and of any premiums on proper policies of insurance, and of any sums for necessary or proper repairs directed in writing by the mortgagee ; (4) In payment of interest accruing in respect of the principal moneys due under the mortgage; and (5) The residue he pays to the person who, but for his possession, would be entitled to receive the income of the mortgaged property. The mortgagee's power of insurance against fire arises at any time after the date of the mortgage deed, and the insurance must not exceed the amount specified

[1] *Union Bank of London* v. *Ingram*, 29 Ch. D., 463 ; Brett's Eq. Cas., 240.

[2] *Merchant Banking Company of London* v. *The London and Hanseatic Bank*, 55 L. J., Ch., 479.

[3] 44 & 45 Vict., c. 41, secs. 19, 23, 24.

in the mortgage deed, or if no amount is specified, then two-thirds of the amount that would be required, in case of total destruction, to restore the property. All moneys received under the insurance are, in the option of the mortgagee, applied in rebuilding, or towards the discharge of the mortgage debt. This power of insuring does not exist when there is a declaration in the mortgage that no insurance is required, or when the mortgagor keeps up an insurance in accordance with the covenant contained in the mortgage deed, or when the mortgage deed contains no covenant as to insurance, and the mortgagor insures to the amount which the mortgagee is authorised to insure for.

Mortgagee suing after foreclosure, or after sale.

It has already been stated that a mortgagee may exercise all his remedies concurrently, so far as feasible, but it should be observed that if he forecloses, and then sues, the effect is to re-open the foreclosure, and to give the mortgagor a renewed right to redeem. If, therefore, the mortgagee sells the mortgaged property, or any part of it, after foreclosing, he cannot then sue for any deficiency.[1] This principle, however, does not apply to a mortgagee who sells under his power of sale, and he can still sue the mortgagor for any deficiency.[2] The difference lies in the fact that in the one case the mortgagee has, by foreclosure, taken to the estate, and when he has sold he has done so as owner, and cannot be permitted in one breath to say that he was absolute owner because he has foreclosed, and, in the other, that he is a lender of money suing to recover it; whilst in the other case he has simply sold in his capacity of mortgagee, under an express power conferred on him by the mortgage deed or by statute.

Lockhart v. *Hardy.*

Rudge v. *Rickens.*

[1] *Lockhart* v. *Hardy*, 9 Beav., 349.
[2] *Rudge* v. *Rickens*, L. R., 8 C. P., 358; Fisher on Mortgages, 931.

Priorities.

In the absence of any particular circumstances, when there are several mortgages on the same estate, they rank according to their dates, but this must be taken subject to the advantage which may sometimes be gained from possessing the legal estate, and, in particular, subject to the doctrine of Tacking which is presently explained. A legal mortgagee, who has notice of a prior equitable charge at the time he advanced his money, can never avail himself of the protection of the legal estate as against such equitable charge; and, with regard to notice, it may be actual or direct notice, or it may be only constructive notice. As regards actual or direct notice, it is safest to give it to the party himself who is sought to be effected thereby, for it does not necessarily follow that notice to the solicitor of a party is equivalent to notice to him, as there is no such thing as a permanent office of a solicitor to a person. Therefore, if notice is not given direct to the individual it is desired to charge with notice, but to his solicitor, the party giving it should always require the solicitor to get an acknowledgment of the receipt of it from his client,[1] which, of course, amounts to direct notice to him.

Constructive notice.

As to what will amount to constructive notice, the rule is that anything which is sufficient to put a person of ordinary prudence upon enquiry, is constructive notice of whatever that enquiry might reasonably have led to. So that if a mortgagee makes an advance, and takes a legal mortgage, but does not get the deeds handed over to him, and it turns out that they were deposited with some one by way of equitable security for a previous advance, the legal mortgagee will be deemed to constructively have notice of the prior charge, and will take subject to it, unless, indeed, he at the time of completing

[1] *Saffron Walden Building Society* v. *Rayner*, 14 Ch., D., 406; 49 L. J., Ch., 465.

his security enquired for the deeds, and a reasonable excuse was given for their non-production. What will, and what will not, amount to constructive notice is a matter depending on the circumstances of each particular case, and, as an illustration, the facts and decision in *Agra Bank, Limited* v. *Barry*,[1] may usefully be referred to. In that case, one Mr. Barry, having borrowed money to a large amount of his wife, who was executrix of her former husband, and, being pressed by her to execute some security for the same, consented to give a legal mortgage on certain property of his in Ireland. A solicitor in England was employed to prepare the mortgage, and he asked Mr. Barry for the title deeds, and he stated that they were at his residence in Ireland, and thereupon the legal mortgage was executed without their production. It afterwards turned out that this was an untrue statement, and that the deeds had in fact been deposited by Mr. Barry at the Agra Bank by way of equitable mortgage. It was held that the legal mortgage had priority, for though the absence of the deeds would primarily amount to constructive notice of the prior equitable charge, yet this constructive notice was rebutted by the solicitor having enquired for the deeds, and what was a reasonable excuse, under the particular circumstances of the case, having been given for their non-production. On the point of notice it is now also provided by the Conveyancing Act 1882[2] as follows:—"A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (1) It is within his own knowledge, or would have come to his knowledge if such enquiries and inspections had been made as ought reasonably to have been made

Agra Bank v. *Barry*.

Provision of Conveyancing Act 1882 as to notice.

[1] L. R., 7 H. L., 135; see also *Oliver* v. *Hinton* (1899), 2 Ch., 264; 68 L. J., Ch., 583; 81 L. T., 212.

[2] 45 & 46 Vict., c. 39, sec. 3; and see *Re Cousins*, 31 Ch. D., 671; 55 L. J., Ch., 662; *Taylor* v. *London and County Bank* (1901), 2 Ch., 131; 70 L. J., Ch., 477; 84 L. T., 397.

by him; or (2) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such enquiry and inspection had been made as ought reasonably to have been made by the solicitor or other agent."

Definition of Tacking.

Tacking may be defined as the uniting of securities on the same property, given at different times, so as to prevent any intermediate incumbrancer from claiming a title to redeem, or otherwise to discharge, one lien which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title.[1] Thus A, B, and C are first, second and third mortgagees respectively, but C when he advanced his money thought he was second mortgagee. Here if C can buy up A's mortgage, and so clothe himself with the legal estate, he will be able to get payment of both mortgages before B, for, as has been significantly said, the legal estate is a plank gained by the third mortgagee, as in a shipwreck, *tabula in naufragio*. The doctrine is founded upon the maxim that "Where the Equities are equal the Law shall prevail," and in point of equity and conscience, in the instance given above, C has as good a right as B, and, therefore, getting in the legal estate, he is allowed to oust B. The essence, therefore, of the doctrine of Tacking is, firstly, the existence and possession, by the person claiming to tack, of a legal estate, and, secondly, an equal equity or right in point of conscience, in such person. If all parties have but equitable interests, then the doctrine cannot apply, and in the absence of any

Reason of the doctrine.

[1] Story, 264.

circumstances giving some superior equity,[1] the parties must be relegated to the order of their existence, for the rule then is *Qui prior est tempore potior est jure*.[2] And though one party may have the legal estate, yet if, at the time he advanced his money, he had actual or constructive notice of the security he is seeking to squeeze out, he cannot succeed in doing so. If a third mortgagee gets a conveyance of the legal estate from the first mortgagee after the latter has been satisfied, and at the date of such conveyance both parties know of the second mortgage, the third mortgagee cannot tack, for he takes the legal estate with notice of a constructive trust which binds it in the hands of the person from whom he takes it.[3] Middlesex and Yorkshire are counties in which registration of all dealings with land has long been provided for,[4] and the question arose whether registration of a mortgage in itself constituted notice. This question was decided in the negative, but it has also been held that where there are several charges, they take effect according to priority of registration, and cannot be tacked.[5] With regard also to Yorkshire, it has been specially provided by the Yorkshire Registries Act 1884, that no protection or priority, by means of the legal estate or Tacking, shall, as from the 1st January, 1885, be permitted as regards lands in Yorkshire, except against an estate or interest existing prior to that date.[6] As regards land registered under the Land Transfer Acts 1875 and 1897, it is specially

Notice prevents Tacking.

Effect of registration in Middlesex and Yorkshire.

[1] See *Farrand* v. *Yorkshire Banking Company*, 40 Ch. D., 182; 58 L. J., Ch., 238; 60 L. T., 669; *ante*, p. 14.

[2] *Marsh* v. *Lee*, 2 Wh. & Tu., 107; Story, 267, 268.

[3] *Betts* v. *Johnson* (1859), 1 John, 302; *West London Bank* v. *Reliance Building Society*, 29 Ch., D., 954; 54 L. J., Ch., 1081; 53 L. T., 442.

[4] But if the title to land has been registered under the Land Transfer Acts 1875 and 1897, no registration in the local registry is necessary.

[5] *Credland* v. *Potter*, 10 Ch., App., 8; 44 L. J., Ch., 169; Fisher on Mortgages, 28.

[6] 47 & 48 Vict., c. 54, sec. 16; Fisher on Mortgages, 540.

provided that registered charges shall, as between themselves, rank according to the order in which they are entered on the register.[1] A building society mortgage can be tacked by the person who pays it off.[2] Apparently a judgment creditor who pays off a first legal mortgage can never tack, for his debt was not incurred in reliance on the land for payment.[3] The doctrine of Tacking applies to both real and personal property, and its effect is simply to alter the priority of payment which would otherwise apply.

Legislative provisions as to Tacking.

The justice of the doctrine of Tacking is undoubtedly open to question,[4] but though temporarily swept away, it was very shortly afterwards revived. By the Vendor and Purchaser Act 1874,[5] the doctrine of Tacking was abolished as regards estates and interests created on or since 7th August, 1874; but by the Land Transfer Act 1875,[6] this provision was repealed except as to anything done before the commencement of the Act.[7] Therefore, between 7th August, 1874 and 31st December, 1875, both inclusive, Tacking was non-existent.

Mortgage for future advances.

Tacking, in a certain sense, may be provided for by a mortgage. Thus, a mortgage may be for £1,000, with power to the mortgagee to make further advances up to £2,000, and add them to his security. It has, however, been decided that if such a mortgagee makes further advances with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advances,[8] and this principle is well illustrated by the case of

[1] 38 & 39 Vict., c. 87, sec. 28.
[2] *Hosking* v. *Smith*, 13 App. Ca., 582; 58 L. J., Ch., 367; 59 L. T., 565.
[3] Coote on Mortgages, 1247, 1248.
[4] See Story, 268, 269.
[5] 37 & 38 Vict., c. 78, sec. 7.
[6] 38 & 39 Vict., c. 87, sec. 129.
[7] 1st January, 1876.
[8] *Rolt* v. *Hopkinson*, 9 H. L. Cas., 514.

Bradford Banking Company v. *Briggs*.[1] In that case the articles of association of a company registered under the Companies Act 1862, provided that the company should have "a first and paramount lien and charge, available at Law and in Equity, upon every share, for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank, as security for the balance due, and to become due, on his current account, and the bank gave the company notice of the deposit. It was held that, although the share certificates stated that the shares were held subject to the articles of association, yet the company could not, in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank, claim priority over the money owing to the bank.

Bradford Banking Company v. *Briggs*.

It has further been held that though, in the first mortgage, the mortgagee has actually covenanted to make further advances, the position is the same as if they had been made without there being such a covenant, and that the mortgagee cannot, after notice of a further security having been created, go on making his further advances, so as to tack them to his first advance, and gain priority over the intervening security. The mortgagee is, by reason of the mortgagor having created another security, discharged from his obligation to make the further advances, and if he makes them, he cannot gain any priority over a lender, who has, in the meantime, made an advance and given him notice.[2]

West v. *Williams*.

[1] 12 App. Ca., 29; 56 L. J., Ch., 364; 56 L. T., 62.

[2] *West* v. *Williams* (1899), 1 Ch., 132; 68 L. J., Ch., 127; 78 L. T., 575; 47 W. R., 308. If a duly registered charge is given of land registered under the Land Transfer Acts 1875 and 1897, and such charge is to secure further advances, and then a second registered charge is given, the question whether this in itself constitutes notice so as to deprive the first chargee of priority in respect of his further advances must be considered doubtful. (Cherry and Marigold's Land Transfer Acts 19, 20.)

Mortgagee losing priority by negligence.

A mortgagee is also liable to sometimes lose his priority by his own conduct. The Court will postpone a legal mortgagee to a subsequent mortgagee: (1) Where the owner of the legal estate has assisted in, or connived at, the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance, or connivance, the omission to use ordinary care in inquiring after, or keeping, title deeds may be, and in some cases has been held to be, sufficient evidence, where such conduct cannot be otherwise explained; or (2) Where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.[1]

Briggs v. *Jones.*

Thus, where a mortgagee of leaseholds lent the lease to the mortgagor to enable him to produce it and procure a further advance, and the mortgagor procured an advance without disclosing the prior mortgage, it was held that the prior mortgagee must rank after the other.[2] To this may be added that a

Oliver v. *Hinton.*

mortgagee will be postponed, and will be precluded from setting up his legal title, if he is guilty of such gross negligence as would make it unjust for him to be allowed to take up the position of a *bonâ fide* purchaser for value, or mortgagee, and deprive someone else of his security, or other interest.[3] But this gross negligence must be of some very extreme kind, for every mere act of carelessness is not sufficient to postpone a legal mortgagee to a

Northern, &c., Company v. *Whipp.*

subsequent incumbrancer. Thus, in one case, the manager of a company gave a legal mortgage of his own property to the company, and afterwards

[1] *Northern Counties of England Fire Insurance Company* v. *Whipp*, 26 Ch. D., 482; 53 L. J., Ch., 629; 51 L. T., 806; Brett's Eq. Cas., 249.
[2] *Briggs* v. *Jones*, L. R., 10 Eq., 92.
[3] *Oliver* v. *Hinton* (1899), 2 Ch., 264; 68 L. J., Ch., 583; 81 L. T., 212; 48 W. R., 3.

abstracted the title deeds from the company's safe by means of a key which he, as manager, had possession of. He then represented the property as being unincumbered, and executed a mortgage to the defendant, handing over the deeds to him. It was held that though the defendant had no notice of the company's mortgage, but believed himself to be first mortgagee, yet the company had not lost its priority, and the defendant's mortgage was subject to theirs.[1]

Consolidation.

A somewhat peculiar doctrine with regard to mortgages is that known as Consolidation of mortgages, a doctrine which rests on principles wholly different from those forming the foundation of the doctrine of Tacking.[2] Consolidation may be defined as the right of a mortgagee, having two or more securities from the same mortgagor, to refuse to allow the mortgagor to redeem one of them without redeeming the other, or others.[3] Consolidation is the union of separate debts charged on separate properties, it does not depend on possession of the legal estate or on want of notice, it may enable a puisne incumbrancer to throw his debt on another property, and it does not matter what the properties are, *e.g.*, a mortgage of life policies can be consolidated with a mortgage of land[4]—in all these points it differs from Tacking. Consolidation was a doctrine very harmless in its early stages, and founded upon principles of natural justice and equity. Thus, if A mortgaged to B, first Whiteacre, and at a later date Blackacre, here, to avoid multiplicity of actions, B was held entitled to refuse to allow one only of the estates to

Definition.

The original doctrine.

[1] *Northern Counties of England Fire Insurance Company* v. *Whipp*, 26 Ch. D., 482; 53 L. J., Ch., 629; 51 L. T., 806.

[2] Fisher on Mortgages, 577, 578; Coote on Mortgages, 873.

[3] 2 Wh. & Tu., 143.

[4] See Coote on Mortgages, 873-884. A moneylender's bill of sale cannot be consolidated with a mortgage of land, *Chessworth* v. *Hunt*, 5 C. P. D., 266; 49 L. J., C. P., 507.

be redeemed. Again, "He who seeks Equity must do Equity," and B may have advanced on Blackacre, knowing it to be an insufficient security, but knowing also that Whiteacre was a very ample security, and thinking that the deficiency on the one would be made up by the surplus on the other; and on this view it was held that it would be inequitable to allow the mortgagor to come and redeem the ample security alone. This doctrine, which was modest and reasonable enough in its commencement, came in course of time to be very much extended, for it was held, in *Vint* v. *Padgett*,[1] that the right to consolidate existed where though the mortgages were originally to different persons, yet they ultimately became vested in one. The current of decisions extending the doctrine did not stop here, for in one case it was held that a mortgagee of one property might as against the assignee of the equity of redemption in another property, consolidate with his security, a mortgage from the same mortgagor on that other property, of which he had taken a transfer after the date of the assignment of the equity of redemption in the second property only.[2] As a consequence, great injustice often occurred, and indeed, by reason of the doctrine in its extended state, no one was safe in buying an equity of redemption, for, though he might be willing to give £500 for an estate, subject to an existing mortgage for £2,000, yet there was the risk that he might find the mortgagee, at some subsequent time, possessed of another, and distinct mortgage, from the same mortgagor, and then he would be unable to redeem the property of which he had bought the equity of redemption, without redeeming the other, and he might thus, perhaps, lose the whole benefit of his purchase.

Extension of the doctrine.

Vint v. *Padgett*.

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[1] 2 De G. & J., 611; 28 L. J., Ch., 21.

[2] *Beevor* v. *Luck*, L. R., 4 Eq., 537; 36 L. J., Ch., 865; now overruled by *Jennings* v. *Jordan* and *Harter* v. *Colman*, *post*, p. 223.

Modification of the doctrine.

In late years, however, the doctrine of Consolidation has been considerably and reasonably modified, it having been now decided that for Consolidation to exist as against the owner of one of the equities of redemption, both or all of the mortgaged properties must not have only been created, but also have become vested in the same mortgagee, before any dealing with the equity of redemption in one of them.[1] Thus, if A mortgages Whiteacre to B, and Blackacre to C, and then sells the equity of redemption of Whiteacre to D, and then B buys up C's mortgage, B will not be allowed to consolidate to the prejudice of D. It has also been held that consolidation is not to be allowed unless there is default by the mortgagor on both mortgages.[2] It must, however, be observed that the cases referred to have not altered the strict decision in the case of *Vint* v. *Padgett*, for there the equities of redemption were vested in one and the same person, though he was not the original mortgagor. Doubts had, however, been thrown on the decision in *Vint* v. *Padgett*, but its principle has been thoroughly recognised and adopted as law by the House of Lords, in *Pledge* v. *White*.[3] In that case there were seven different mortgages of different properties, which had ultimately all become vested in one person, and all the equities of redemption had likewise become vested in another person before all the mortgages had come into the same hand. The owner of the equities of redemption sought to redeem one only of the properties, and the defendants claimed to be entitled to consolidate. It was admitted that if *Vint* v. *Padgett* was still good law, the plaintiffs could not succeed. The House of

Harter v. *Colman*.

The decision in *Vint* v. *Padgett* still stands.

Pledge v. *White*

[1] *Jennings* v. *Jordan*, 6 App. Ca., 698; 51 L. J., Ch., 129; Brett's Eq. Cas., 256; *Harter* v. *Colman*, 19 Ch. D., 630; 51 L. J., Ch., 481; 46 L. T., 152; *Minter* v. *Carr* (1894), 3 Ch., 498; 63 L. J., Ch., 705; 71 L. T., 526.

[2] *Cummins* v. *Fletcher*, 14 Ch. D., 699; 49 L. J., Ch., 563; 42 L. T., 859.

[3] (1896) A. C., 187; 65 L. J., Ch,, 449; 74 L. T., 323.

Lords decided that the defendants were entitled to consolidate. Lord Halsbury said: "I think the principle laid down in *Vint* v. *Padgett* has been so firmly established now, by authority in our technical system, that I feel that more mischief would be done by dissenting from it than by acquiescing in it." Lord Davey delivered an elaborate judgment, in which he reviewed most of the important authorities on the subject. In the course of it he said: "If your Lordships affirm the decree now under appeal, the doctrine of Consolidation will be confined within at least intelligible limits. It will be applicable where at the date redemption is sought, all the mortgages are united in one hand and redeemable by the same person, or where, after that state of things has once existed, the equities of redemption have become separated."

Provision of Conveyancing Act 1881.

In considering the doctrine of Consolidation, it must, however, be borne in mind that it has been considerably affected by the Conveyancing Act 1881,[1] which provides that when the mortgages, or one of them, are, or is, made on or after 1st January, 1882, *and so far as no contrary intention is expressed*, a mortgagor seeking to redeem, shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. The doctrine, therefore, only exists where all the mortgages are prior to 1st January, 1882, or where the enactment just referred to is excluded, as is very often the case. It seems to be the usual practice to insert a clause excluding this section,[2] but such a clause cannot be insisted on under a contract to execute a legal mortgage with such

[1] 44 & 45 Vict., c. 41, sec. 17.
[2] See 33 Ch. D., at p. 217.

powers and provisions and in such form as the lender may require for securing the principal and interest.[1]

Mortgagee realizing after death of mortgagor and claiming to retain surplus towards another debt.

If a mortgagee realizes his security during his mortgagor's lifetime, and the mortgagor is the party absolutely entitled to the equity of redemption, there is nothing to prevent the mortgagee from applying the balance of the sale moneys to make good the deficiency on another mortgage, or indeed to satisfy any other debt, which may be owing to him by the mortgagor.[2] If, however, a mortgagee realizes his security after the death of the mortgagor, and has then a surplus in his hands after discharging the mortgage, he has no right to retain that surplus in satisfaction of another debt the deceased owed him, to the prejudice of other creditors.[3] Thus, G died insolvent, having mortgaged his life estate in Blackacre, to secure an annuity granted by himself and payable during his own life. He had subsequently mortgaged a policy on his own life to the same mortgagees. After the death of G, the mortgagees received, in respect of the policy, a sum more than sufficient to satisfy the amount secured on it, and they claimed to be entitled to set off the balance against an amount owing to them in respect of the arrears of the annuity. The Court decided that they had no such right.[4]

Re Gregson.

Position on payment off of mortgage.

When a mortgage is paid off, the estate is re-conveyed to the mortgagor, or other person standing in his shoes and entitled to the equity of redemption; and there is a duty cast on the mort-

[1] *Farmer* v. *Pitt* (1902), 1 Ch., 954; 71 L. J., Ch., 501; 50 W. R., 453.
[2] *Selby* v. *Pomfret*, 3 De G. F. & J., 595.
[3] *Talbot* v. *Frere*, 9 Ch. D., 568.
[4] *Re Gregson, Christison* v. *Bolam*, 36 Ch. D., 223; 57 L. J., Ch., 221; 57 L. T., 250.

gagee to see that he transfers to the proper party, and he is liable for any loss caused by his not doing so.[1] It is, therefore, essential that a mortgagee should carefully preserve any notices he may receive of subsequent mortgages effected by the mortgagor. If no re-conveyance takes place, then the position of the mortgagor is technically that of tenant-at-will to the mortgagee, and that tenancy will, under the Statute of Limitations,[2] be deemed to have determined at the end of a year from the payment off; and twelve years after that time any right or estate of the mortgagee will be barred, and the mortgagor's position will be the same as if the property had been re-conveyed to him.[3] If a mortgage of fee simple property is cancelled by a mortgagee, such cancellation destroys the debt, but it does not operate to revest the estate, and the mortgagee becomes a trustee of the legal estate for the mortgagor.[4]

Cancellation of mortgage.

Disadvantages of a second mortgage.

In the foregoing pages the student will have observed that a person taking a second mortgage of property is not in as good a position as a first mortgagee. The disadvantages of a second mortgage may be summarized as follows:—(1) The second mortgagee does not get the legal estate, or the deeds, both of which are taken by the first mortgagee; (2) He is liable to be postponed in some cases, by reason of the doctrine of Tacking; (3) He is entirely subject to the first mortgagee, and can only exercise his powers subject to the first mortgagee's rights; (4) He is liable to be made a party to a foreclosure suit, or to have the property sold over his head, and it may be necessary

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[1] *Magnus* v. *Queensland National Bank*, 36 Ch. D., 25; 56 L. J., Ch., 927; 57 L. T., 136.

[2] 3 & 4 Will. 4., c. 42, sec. 7.

[3] *Sands* v. *Thompson*, 22 Ch. D., 614; 52 L. J., Ch., 406; 48 L. T., 210. See Indermaur & Thwaites' Conveyancing, 197, 296.

[4] Fisher on Mortgages, 728; Coote on Mortgages, 1425.

for him, to prevent his losing the entire security by the enforcement by the first mortgagee of his rights, to pay him off, and thus take the security into his own hands.

CHAPTER VI.

THE RECTIFICATION AND SETTING ASIDE OF WRITTEN INSTRUMENTS, AND HEREIN OF ACCIDENT, MISTAKE, AND FRAUD.

THE assistance of the Court to rectify, or set aside, any written instrument is chiefly sought on grounds coming under the heads of mistake or fraud, and in some exceptional cases on the ground of accident. These subjects, no doubt, embrace more than questions of rectification, but it appears convenient to consider them together.

Definition of an accident.

An accident remediable in Equity may be defined as some unforeseen event, misfortune, loss, act, or omission, not the result either of gross negligence, or misconduct, in the party.[1] To get relief in Equity, the applicant must have a conscientious claim to assistance, and must be unable to get relief at law. Thus Equity will not relieve if the applicant has entered into an express contract, for he might have foreseen the matter and provided for it, or against the countervailing equity of a purchaser without notice. This is very different to what is understood by an accident in the ordinary sense in which that expression is used, for it then usually signifies any occurrence not referable to design, but in cases of that character only, the Court never gives relief. If a lessee covenants to keep the demised premises in repair, he will be absolutely bound by this covenant, notwithstanding anything that may happen, *e.g.*, that the premises are destroyed by lightning, or by public enemies, or any other extraordinary event,

[1] Story, 50.

and the reason is that he might, by his contract, have provided for any such contingencies, if he had chosen.[1]

Defective execution of powers.

A good instance of an accident, recognised as such by Equity, occurs in the case of the defective execution of a power of appointment, although such a defect is, perhaps, more likely to occur by reason of mistake, of which, therefore, it also forms an example. The Court does not, however, in all cases interfere, because, either through accident or mistake, a power is insufficiently or defectively executed, but it grants relief only in favour of persons who are considered as, in a moral sense, entitled to such assistance, and are, therefore, viewed with peculiar favour, and then only where there are no opposing equities. The persons thus favoured are a purchaser, a creditor, a wife, a legitimate child (but not a grandchild), and a charity. The Court will not relieve in favour of a husband, unless, indeed, he is an intended husband at the time, when, of course, he is a purchaser.[2]

In whose favour the Court relieves.

What defects remedied.

It is not every defect in the execution of a power that the Court will relieve in respect of, but only when the defect is not really of the very essence of the power. Thus, a defect in executing a power by will, when it was required to be by deed or other instrument *inter vivos*, will be aided, as will the want of a seal, or of witnesses, and defects in the limitation of the property, estates, or interests. But, if a power is to be executed with the consent of certain parties, this is of the essence of the matter, and relief cannot be given to aid an execution of the power made without such consent. So, also, if a power is required to be executed by will, and it is

Tollet v. *Tollet*.

[1] Story, 50, 57.
[2] Story, 59; *Tollet* v. *Tollet*, 2 Wh. & Tu., 289.

executed by an irrevocable and absolute deed, the Court will not support such an execution, for it is apparently contrary to the settlor's intentions, a will being always revocable during the testator's lifetime, whereas a deed would not be revocable unless it is expressly so stated in it.[1]

No relief against non-execution of power.

But although the Court relieves against the defective execution of a power, it stops short there, and refuses to relieve as regards the non-execution of a power.[2] Thus, if A has a power of appointment, and is about to exercise it in favour of B, when he is suddenly called away, and then he dies before he can execute it, here the Court will not give relief in favour of B. To this rule there may be said to be two exceptions. The first of such exceptions is when the execution has been prevented by fraud.[3] Thus, suppose that A has a power of appointment, and, in default of appointment, the property is to go to B. A is about to exercise the power in favour of C, but B, to prevent him doing so, untruly represents that C has been provided for by some other person, and, believing this, A does not appoint, and dies, leaving the property to go in default of appointment to B. Here, B would not be allowed to benefit by his fraud, but C, if he could prove these facts, would get relief. The second exception—if, indeed, it can be called one—is where the power is not a bare power, but is coupled with a trust, for in all such cases Equity will interfere, and grant suitable relief.[4] Thus, for instance, if a testator should by his will devise certain property to A, with directions that A should, at his death, distribute the same amongst his children, as he should choose, and A should die without making such distribution,

Except when execution prevented by fraud.

Or when power coupled with a trust.

[1] Story, 59, 60.
[2] *Tollet* v. *Tollet*, 2 Wh. & Tu., 280; Story, 58.
[3] Story, 58.
[4] *Harding* v. *Glynn*, 2 Wh. & Tu., 335.

the Court would interfere and make a suitable distribution, because it is not given to the devisee as a mere power, but as a trust and duty which he ought to fulfil, and his omission, whether from accident or otherwise, ought not to disappoint the objects of the testator's bounty. It would be very different if it were the case of a mere naked power, and not a power coupled with a trust.[1] Thus, in a recent case, a marriage settlement gave freeholds to the wife for life, with remainder as she should by will appoint, with a gift over in default of appointment. The wife by will gave the freeholds to her husband for life, with power to him to dispose of them by will amongst their children. There were several children, but the husband died without appointing. It was held that the husband had only a bare power of appointment, and that, it not having been executed, the children could not take, but the gift over in the settlement took effect.[2]

Re Weeke's Settlement.

As other instances in which the Court will give relief on the ground of accident, may be mentioned the following :—

Other instances of accident.

An executor, having to pay various legacies, carelessly pays some in full, and the estate is insufficient to pay all in this way, so that there ought to have been a proportionate abatement. Here, if the executor is insolvent, the unpaid legatees have a right against those who have been paid in full, to compel them to refund in proportion.[3]

Wrong payment of legacies.

An annuity is given by will, and the executors are directed to set aside a sufficient amount of certain stock to meet such annuity. This they do, but

Reduction of stock.

[1] Story, 60 ; and see *Burrough* v. *Philcox*, 5 My. & C., 72.
[2] *Re Weeke's Settlement* (1897), 1 Ch., 289; 66 L. J., Ch., 179; 76 L. T., 112.
[3] Story, 57.

subsequently the stock is reduced by Act of Parliament, so that the annuity falls short. The Court will decree the deficiency to be made up against the residuary legatee.[1]

Lost bonds.

One of the most common cases of the interposition of Equity under the head of accident, was formerly in the case of lost bonds or negotiable instruments. At Common Law an action could not be brought upon a lost bond, because there could be no *profert* of the instrument, so that in all such cases relief was sought in Equity. But, in more recent times, it has been unnecessary to come to Equity in such matters, as the Courts of Law entertained jurisdiction, and dispensed with the *profert*, if an allegation was made of loss by accident.[2] So also, formerly, Equity would give relief, on the ground of accident, in the case of lost bills of exchange and other negotiable instruments; but to seek such special relief has now long been unnecessary, it having been provided that, on application made, the Court may, on a proper indemnity being given, refuse to allow the loss of the instrument to be set up.[3] But if a bond or negotiable instruments were destroyed, there never was a right to relief in Equity, for Law could give judgment for the debt on proof of the destruction and on secondary evidence of the contents.

Definition of mistake.

Mistake may be defined as some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.[4] A mistake may be either of matter of fact, or of law; and whilst as to the former the rule is, *Ignorantia facti excusat*, the rule as to the latter is just the contrary, viz.:—*Ignorantia legis neminem excusat*. These two simple

[1] Story, 58.
[2] Story, 51.
[3] 17 & 18 Vict., c. 125, sec. 87; 45 & 46 Vict., c. 61, sec. 60.
[4] Story, 65.

rules or maxims do not, however, at all adequately answer the question of when Equity will give relief in cases of mistake, and it is, therefore, necessary to consider the matter more in detail.

Mistakes of fact.

With regard to mistakes of fact, the mistake may be either unilateral—that is, on one side only—in which case relief is almost universally given, more on the ground of surprise, or fraud, practised on the other party, than strictly on the ground of mistake[1]; or it may be a mutual mistake on the part of both parties. In all cases, to entitle a person to relief, the fact on which there was the mistake must have been one material to the matter. Thus, suppose A were to sell to B an estate well-known to both, and their mutual idea was that the area was 100 acres, whereas it really contained something less, but the difference would not have varied the purchase in the view of either party, such a mistake as this would not form any ground for rescinding the contract.[2]

The mistake must have been material.

Mutual mistake unconnected with fraud.

Mistake of fact pure and simple—that is, mutual mistake—is unconnected with fraud, for here, however innocent both parties may be, yet the Court will relieve if the mistake is so material that it in fact goes to the essence of the contract. Thus, if one agrees to sell, and another to buy, a house which actually at that time is not in existence—say, through having been destroyed by fire, or washed away by a flood—the Court will relieve the purchaser, upon the ground that both parties intended the sale and purchase of an existing thing, and implied its existence as the basis of their contract. Or if the sale of a life policy has been made and completed under the common mistake that the insured was alive whereas he was in fact dead, the Court will rescind the

[1] Story, 90.
[2] Story, 86-87.

contract even after completion.[1] So, again, if one person understands that, in buying an estate, a certain piece of land is included as parcel thereof, but the other party had no intention of selling that piece of land, here the Court would set aside the contract.[2]

General rule as to giving relief.

The general rule on the point of what mistakes of fact form ground for obtaining relief is, that mistake, or ignorance of facts, is a proper subject for relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intentions by a mutual error; or where it is inconsistent with good faith, and proceeds from the violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference, unless indeed as above stated it is a matter which goes to the essence of the contract.[3] And it should be noticed that acquiescence in a mistake will deprive a person of any right to be relieved against it.[4]

Remedy in cases of mistake.

The remedy given by the Court in cases of mistake is sometimes rescission of the contract, and sometimes rectification of its terms. The general rule is, that when a mistake is mutual, the Court will rectify the instrument by substituting the terms really agreed on, though of course, if the mistake goes to the essence of the contract, then it is entirely

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[1] *Scott* v. *Coulson* (1903), 2 Ch., 249; 72 L. J., Ch., 600; 88 L. T., 653.

[2] Story, 88; see also *Cooper* v. *Phibbs*, L. R., 2 H. L., 149; Brett's Eq. Cas., 90.

[3] Story, 92.

[4] *Earl Beauchamp* v. *Winn*, L. R., 6 Eng. & Ir. Apps., 223.

abrogated. But when the mistake is unilateral, then the remedy is rescission, though the Court may, if it thinks fit to do so, in lieu of rescission, give the defendant the option of having the contract rectified, so as to make it, in fact, what the plaintiff intended it should have been. Cases in which the Court will rescind, rather than rectify, border often closely on fraud, and, in the most direct and proper instances of mistake, rectification is the usual redress that the Court gives. Sometimes by mistake, an instrument contains less than the parties intended, sometimes more, and sometimes it simply varies from their intent by expressing something different in substance from what was intended. In all such cases the rule is, that if the mistake is clearly made out by satisfactory proofs, Equity will reform the contract, so as to make it conform to the precise intent of the parties.[1] Thus, marriage settlements are often reformed and varied, so as to conform to the previous articles, on the strength of which the parties married, or which the settlement is recited to be made in pursuance of.[2] Where there are discrepancies between marriage articles and a subsequent marriage settlement, the rule is, that if the articles were executed before marriage and the settlement afterwards, then the articles govern, and the settlement will be rectified so as to conform to the articles; but where both the articles and the settlement were made before marriage, then, if there is any difference between them, the parties are concluded by the settlement, and that governs, as being the more complete and final instrument, unless, indeed, the settlement recites that it is made in pursuance of the articles, when it will be made subservient to them.[3] And generally when there

Differences between marriage articles and marriage settlements.

Legg v. *Goldwire.*

[1] Story, 92.
[2] *Legg* v. *Goldwire*, 2 Wh. & Tu., 770.
[3] *Ibid.*

is some memorandum or note of a transaction, and then a formal instrument is executed, any such memorandum or note is admissible for the purpose of showing a mistake in the formal instrument, provided that in all such cases it is clearly shown that the parties meant, in the final instrument, merely to carry into effect the transaction indicated by their prior memorandum or note.[1]

Mistake implied.

In some cases the Court will relieve where, irrespective of actual proof of error, a mistake may be fairly implied from the nature of the case. Thus, where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the Court has reformed the bond, and made it joint and several, upon the reasonable presumption, from the nature of the transaction, that it was so intended by the parties.[2]

No relief against a *bonâ fide* purchaser.

Notwithstanding that an instrument may, by mistake, not be what the parties intended, and may confer an estate not meant to be conferred, yet until rescinded or rectified by the Court, the instrument stands; and, therefore, if any disposition is made under or by virtue of such instrument, whereby the property comprised therein becomes vested in a *bonâ fide* purchaser for value without notice of the mistake, and he has the legal estate, the Court will not grant any relief as against him, upon the common rule, "Where the Equities are equal the Law shall prevail."[3]

Rectification of wills.

The jurisdiction of the Court to rectify and reform written instruments, applies not only to instruments

[1] Story, 96.
[2] Story, 99.
[3] Story, 109. As to this maxim, see *ante*, pp. 10-18.

inter vivos, but also to wills, when the mistake can be made out from the words in the will itself, but not otherwise, for parol evidence is not admissible in such a case to show that something was intended by the testator, which the will does not express.[1] If, however, a gift is made by a will, and no persons are found to fit in with the description the will contains, extraneous evidence may be given to show who was meant by the erroneous description. Thus, in a recent case a testator left £100 apiece to each of the daughters of a person described as his "late friend, Ignatius Scoles." There was an Ignatius Scoles living at the testator's death, but he had no daughter, and was in fact unmarried. He had a father, Joseph John Scoles, who had predeceased the testator, and who had left five daughters, and it was palpable that the testator meant these daughters and had, by mistake, described them as the daughters of Ignatius Scoles, instead of the daughters of Joseph John Scoles. The Court admitted evidence to show that this was really the intention of the testator, and directed the legacies to be paid to the five daughters of Joseph John Scoles.[2] The Court will also give relief against the revocation of a legacy, when the revocation was made under a mistake. Thus, if a testator by a codicil revokes a legacy, which by his will he has given to A, giving as a reason that A is dead, whilst in fact A is living, Equity will hold this revocation invalid, and order the legacy to be paid.[3]

Re Waller, *White* v. *Scoles*.

Revocation of legacy under mistake.

With regard to mistakes of law, the probable ground for the maxim *Ignorantia legis neminem excusat* is, that, were it otherwise, there is no saying to what extent the excuse of ignorance might not be carried.[4]

Mistakes of law.

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[1] Story, 110.
[2] *Re Waller*. *White* v. *Scoles*, 68 L. J., Ch., 526; 80 L. T., 701; 47 W. R., 563.
[3] Story, 111.
[4] *Per* Lord Ellenborough, 2 East, 469.

Release of one of several obligors.

One of the most common cases put to illustrate the doctrine, is where two or more are bound by bond, and the obligee releases one, supposing, by mistake of law, that the other will still remain bound; in such a case the obligee will not be relieved in Equity on the ground of mistake of law.[1] In the same way, if a creditor releases his debtor, and there is a surety who is also incidentally released by this act, no relief will be given because the creditor did not know the law, and thought that he would still have his rights against the surety. So also where a person had a power of appointment, and executed it absolutely, without introducing a power of revocation, thinking erroneously that being a voluntary deed it was revocable, relief was refused because his mistake was one of law.[2] If, however, the power of revocation had been intended to be inserted, but was somehow omitted by mistake, that would be different, for the Court would in such a case relieve, as that would be really mistake of fact.[3]

When the Court will relieve in respect of mistakes of law.

In some exceptional cases, however, notwithstanding the general rule, the Court will relieve although the mistake is one of law.[4] Such cases are, however, rare, and on an examination of various decisions in which it appears that relief has been thus given, it will mostly be found that they involve mixed principles, embracing sometimes mistakes of fact also, and sometimes surprise, or even fraud. From these decisions, however, we may gather that there is one class of cases in which, although substantially the mistake is one of law, yet the Court will give relief.

Lansdowne v. *Lansdowne.*

viz.: Where there is a plain and established doctrine on the subject, so generally known, and of such

[1] Story, 67.
[2] *Worrall* v. *Jacob*, 3 Meriv., 195.
[3] Story, 67.
[4] *Lansdowne* v. *Lansdowne*, 2 Jacob & Walker, 205; *Bingham* v. *Bingham*, 1 Ves., 126.

constant occurrence, as to be understood by the community at large; for here ignorance of law, and of title founded on it, is ground for the Court giving its assistance, so that if any person, acting in ignorance of the plain and settled rule of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, the Court will grant relief.[1] Thus, if through ignorance of the common rule of descent that the eldest son is heir, such son were to divide the estate with his brother, relief would be given. The real reason of this exception to the maxim *Ignoratia legis neminem excusat*, seems to be, that the mistake is of such a kind that it gives rise to an almost irrebuttable presumption of undue influence, imposition, mental imbecility, surprise, or confidence abused; so that to some extent it may fairly be said that the exception is more apparent than real, and that the mistake of law is not the foundation of the relief, but is the medium of proof to establish some other proper ground of relief.[2]

Reason the Court relieves in such a case.

But where there is a doubtful point of law, such as a question respecting the true construction of a will, there is nothing whatever to prevent a compromise, and though naturally one party must be wrong in his view, yet he can never afterwards seek relief on the ground of mistake, that is, assuming that the compromise was fairly entered into with due deliberation.[3] In all cases of compromises which to any material extent depend on certain matters of fact as the basis of the compromise, there must be a full and fair disclosure by each party to the other, of all the facts connected with the matter which are known to him, and which might influence the other.

Compromise of a doubtful point of law.

Stapilton v. *Stapilton*.

[1] See Story, 70, 76. [2] Story, 76.
[3] *Stapilton* v. *Stapilton*, 1 Wh. & Tu., 223; Story, 68.

Family compromises.

A family compromise entered into for the purpose of settling disputes which have arisen between the parties, will always be upheld if the parties have acted fairly towards each other, although it may afterwards turn out that the parties, or one of them, was quite mistaken in the fact, *e.g.*, in cases of suspected illegitimacy. But there must be complete fairness between the parties, and if there is any concealment, or even omission to make disclosures, of pertinent facts known to any of the parties, the arrangement will be set aside.[1] Thus, in one case there had been an agreement between two brothers for the settlement of the family estates, as the younger disputed the elder's legitimacy. At the time of the agreement, however, the younger brother was aware of a private marriage that had taken place, but he did not communicate this to the other. The legitimacy of the elder brother was afterwards established, and although some nineteen years had elapsed, the Court set aside the compromise, holding that it mattered not whether the omission to disclose originated in design, or in an honest opinion of the invalidity of the private marriage, and of there being no obligation on the younger brother's part to make, or utility in making, the communication.[2]

Gordon v. *Gordon.*

Foreign law.

It may be observed that ignorance of foreign law is deemed ignorance of fact, and therefore relief may be obtained on that ground, as in other cases of mistakes of fact.

Reason of the Court's interference in cases of mistake generally.

The effect of the Court's interference on the ground of mistake, is, naturally, in many cases to upset or to vary written documents, and the reason of its entertaining jurisdiction and giving the relief

[1] Story, 79, 80.

[2] *Gordon* v. *Gordon*, 3 Swanst., 400. See as to family arrangements generally, irrespective of any compromise of doubtful rights, *Williams* v. *Williams*, L. R., 2 Ch., 294 ; Brett's Eq. Cas., 109.

it does, has been well stated by Mr. Justice Story in his work on Equity jurisprudence, as follows :—"It is difficult to reconcile this doctrine with that rule of evidence at the Common Law, which studiously excludes the admission of parol evidence to vary or control written contracts. The same principle lies at the foundation of each class of decisions, that is to say, the desire to suppress frauds, and to promote general good faith and confidence in the formation of contracts. The danger of setting aside the solemn engagements of parties, when reduced to writing, by the introduction of parol evidence substituting other material terms and stipulations, is sufficiently obvious. But what shall be said where those terms and stipulations are suppressed, or omitted, by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity to accomplish his own base designs? That would be to allow a rule, introduced to suppress fraud, to be the most effectual promotion and encouragement of it. And hence, Courts of Equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts, wisely deeming such cases to be a proper exception to the rule, and proving its general soundness."[1]

Evidence of mistake.

The Court will decline to rectify an alleged mistake, even in a voluntary settlement, on the unsupported evidence of the settlor as to what his intentions really were.[2]

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[1] Story, 93. See also Williams on Vendor and Purchaser, Chap. 13, pp. 697-707.

[2] *Bonhote* v. *Henderson* (1895), 2 Ch., 202; 72 L. T., 814; 43 W. R., 580.

Fraud.

It is evident that mistake is often closely allied to fraud, although, of course, as has been pointed out, there may be cases in which all parties concerned in a mistake are perfectly innocent. Fraud in Equity may be described as such conduct on the part of a person as is either deliberately wrong, or is considered by the Court as wrong, and which therefore forms a ground for the assistance of the Court to set aside a transaction tainted with it, or a ground upon which to resist liability in respect of it. The ways and modes of fraud are infinite, and the Court of Chancery has always declined to lay down any general proposition as to what shall constitute fraud, so that it is impossible to accurately define it.

What is fraud in Equity?

Definitions of actual and constructive fraud.

Fraud in Equity is of two kinds, Actual and Constructive. Actual fraud may be defined as something said, done, or omitted by a person, with the design of perpetrating what he must have known to be a positive fraud. Constructive fraud may be defined as something said, done, or omitted, which is construed as a fraud by the Court, because, if generally permitted, it would be prejudicial to the public welfare. The great distinction to be observed is that whereas in actual fraud there is the design to do evil, in cases of constructive fraud there may be no such design, and the act may, indeed, in the opinion of the person chargeable therewith, amount to nothing more than was allowable and justifiable. It is only the Court which steps in, and declares what is done to be a fraud, as calculated to do harm; and, in fact, in many cases of constructive fraud there may really be nothing harmful in the individual transaction, but, to allow it to be good in one particular instance would be to open the door to much possible evil in other cases.

Distinction.

Actual fraud.

Dealing first with actual fraud, it presents itself as being either *suggestio falsi*, or *suppressio veri*. If a person makes an untrue representation to another, which he knew at the time to be false, or which even though he did not actually know to be false, still he did not believe to be true, or which he made recklessly without any knowledge or actual belief in its truth, and he has thereby induced the other to act on the faith of his representation, and the representation was of a material fact—the Court will relieve, and will set the transaction aside.[1] But when a representation which is made, is honestly believed in, then, though in fact it is untrue, and though it was made carelessly, and without due enquiry, this will not amount to fraud.[2]

Suggestio falsi.

Suppressio veri.

As to cases of *suppressio veri*, it is not every concealment, even of facts material to the interests of a party, which will entitle him to the interposition of the Court, but the case must amount to the keeping back of facts which one party is under some legal, or equitable, obligation to communicate to the other, and which the other has a right to know, not merely *in foro conscientiæ*, but *juris et de jure*.[3] Fraud of the *suggestio falsi* class affords not only a ground for setting aside a transaction, but also gives the person injured a right of action for damages caused to him thereby; but if the fraud simply consists of *suppressio veri*, the only right gained thereby, is to have the transaction set aside, or to resist its enforcement, and an action for damages cannot be maintained.

Remedies in respect of fraud.

Silence not ordinarily fraud.

In the great majority of dealings between two parties, there is strictly no obligation on one to

[1] *Redgrave* v. *Hurd*, 20 Ch. D., 1; 51 L. J., Ch., 113; *Smith* v. *Chadwick*, 9 App. Ca., 187; 53 L. J., Ch., 873; *Edgington* v. *Fitzmaurice*, 55 L. J., Ch., 650.

[2] *Derry* v. *Peek*, 14 App. Ca., 337; 58 L J., Ch. (H. L.), 864; 38 W. R., 33; *Low* v. *Bouverie* (1891), 3 Ch., 82; 60 L. J., Ch., 594; 65 L. T., 533.

[3] Story, 131-133.

Vendor not bound to disclose defects.

inform the other of any circumstances connected with the matter, for each must look out for himself.[1] The maxim *Caveat emptor* applies. Thus, there is no obligation on a vendor of land, either at Law or in Equity, to disclose defects in the property he is selling, when they are of a patent nature which the purchaser could ascertain for himself, *e.g.*, that there is a right-of-way over the property.[2] And even the non-disclosure of a latent defect in quality—*i.e.*, one the purchaser could not ordinarily find out for himself—does not entitle the purchaser to relief, unless it materially interferes with the enjoyment promised by the contract or by the vendor's representations which induced the contract or unless some actual fraud has been used to conceal it, *e.g.*, papering over cracks in the walls.[3] All defects of title must also be disclosed by a vendor. There is ordinarily also no obligation cast on a purchaser to disclose facts to his vendor which render the property more valuable than the vendor thought it to be, for every one must be supposed to know the value of the property he is selling. Thus, a purchaser is not bound to inform the vendor that he knows of minerals in the land, of which fact the vendor is ignorant, and which renders the property of much greater value. In such cases the question is, not whether an advantage has been taken which in point of morals is wrong, but it is essentially necessary, in order to set the transaction aside, that there should have been some obligation on the part of the individual to give the information. A Court of Equity will not correct or avoid a

Purchaser not bound to inform vendor of special value of estate.

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[1] *Turner* v. *Green* (1895), 2 Ch., 205 ; 64 L. J., Ch., 539 ; 72 L. T., 763.

[2] *Oldfield* v. *Round*, 5 Ves., 508. But it would be otherwise if the right-of-way is not discoverable by inspection and materially interferes with the enjoyments of the thing sold, *Ashburner* v. *Sewell* (1891), 3 Ch., 405 ; 60 L. J., Ch., 784 ; 65 L. T., 524.

[3] See Williams on Vendor and Purchaser, 680-688, and cases there cited ; but compare Dart, 1088, 1089.

contract merely because a man of nice honour would not have entered into it; the case must fall within the idea of fraud as recognised by the Court, and the rule must not be extended so as to affect the general transactions of mankind.[1] But if there is not merely an omission to inform, but there is in fact a misrepresentation, this may be fraud, as if the purchaser is expressly asked by the vendor if he is aware of there being any special circumstances of value connected with the property, which he, the vendor, is not aware of, and the purchaser replies in the negative, though possessed of this knowledge.

Cases in which disclosure necessary.

It may be well, however, to notice some specific cases in which concealment or non-disclosure of facts will be held to constitute fraud. By far the most comprehensive class of cases arises where a fiduciary relationship exists between the parties, for anything material kept back here by the person occupying the fiduciary position, will be sufficient to induce the Court to set the transaction aside.[2] Cases of insurance also furnish another instance in which disclosure is necessary, for if the insurer keeps back any material fact which might have influenced the granting of the policy, this will amount to fraud. There must here be every disclosure, and if any material facts are withheld, whether the concealment be by design or accident, it is equally fatal. Thus, if a person in proposing his life for insurance, omits to inform the insurance company that his life has been rejected by another office, and the company accepts his proposal, and issues the policy not knowing of this, here is good ground for setting the same aside.[3] Again, if a creditor takes a guarantee for some debt of a third person, and is at

Trustees, &c.

Insurance.

Surety.

[1] Story, 131, 132.

[2] *Ibid.*, 138; and see hereon *ante*, p. 102, and *post*, p. 255.

[3] *London Assurance Company* v. *Mansel*, 11 Ch. D., 363; 48 L. J., Ch., 331.

the time aware of facts, of which the surety is ignorant, which render the surety's liability and risk much greater than he supposed, the creditor is bound to inform him thereof.[1] And the necessity of full disclosure in the matter of family compromises or arrangements has already been referred to.[2] All matters of this nature are said to be *uberrimæ fidei*, that is to say, the fullest disclosure must be made, and the greatest fairness observed.

Persons in an exceptional position.

There are certain cases in which, from the exceptional position in which a party is placed, any dealing with him is not looked at in the same way as a similar transaction would be if entered into with a

Lunatics and idiots.

person not so situated. Thus the Court watches, with the most jealous care, every attempt to deal with persons *non compos mentis*, and whenever there is any evidence of the absence of good faith, or the transaction cannot be for their benefit, the Court will set it aside, or make it subservient to their just rights

Persons of weak understanding.

and interests.[3] And this same principle is applied to some extent to persons who, though not actually *non compos mentis*, are yet of weak understanding, for it is a rule that, as such persons are specially liable to imposition, their acts and contracts will be set aside, if of such a nature as to justify the conclusion that they have been imposed upon, circumvented, or overcome, by cunning, artifice, or

Intoxicated persons.

undue influence.[4] So, also, if a contract is entered into with a person who is in such a state of drunkenness as to be deprived for the time of the use of his reason and understanding, the Court will

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[1] *Pidcock* v. *Bishop*, 3 B. & C., 605.

[2] *Ante*, p. 240.

[3] Story, 143, 144. But the mere fact that the person is of unsound mind is no ground in itself for setting a contract aside, unless, at the time, his insanity was known to the other party (*Imperial Loan Company* v. *Stone* (1892), 1 Q. B., 599; 61 L. J., 1 Q. B., 449; 66 L. T., 556).

[4] Story, 146.

interfere. But if there is not that extreme degree of drunkenness, the Court will not give any relief, unless there has been some contrivance or management to draw the party into that state, or some unfair advantage taken of his condition.[1]

Proof of fraud.

To make out a case of actual fraud some proof thereof must be given, and circumstances of mere suspicion will not be sufficient. The Court of Chancery has always acted on a lower degree of proof of fraud than was accepted by the Courts of Law, but as Law and Equity are now fused, and the rules of Equity prevail, there is no object in here considering this difference. The Court does not insist upon positive and direct proof of fraud, for it would in many cases be an utter impossibility to give such proof, but the Court will deduce the evidence, from circumstances affording strong presumption.[2]

Inadequacy of price.

Mere inadequacy of price is not by itself, ordinarily, a sufficient circumstance from which the Court can conclude that there is fraud, for persons must be left to judge for themselves as to the value of their property.[3] If, however, the inadequacy is so gross as to manifestly demonstrate some imposition, or undue influence, or, as it is sometimes expressed, to "shock the conscience," or if there are other suspicious circumstances in addition to the inadequacy, then it is otherwise, and the transaction may be set aside.[4] But the Court will not relieve in all cases even of very gross inadequacy attended with circumstances which might otherwise induce it so to do, if the parties cannot be placed *in statu quo*—as for example in cases of marriage settlements, for the Court cannot unmarry the parties.[5]

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[1] Story, 145.
[2] *Ibid.*, 117.
[3] *Harrison* v. *Guest*, De G. M. & G., 424.
[4] Story, 155.
[5] *Ibid.*, 157.

Money Lenders Act 1900.

In connection with this subject, the Money Lenders Act 1900[1] must be noticed. By this Act a person who carries on the business of a money lender must be registered, or else his contracts are void.[2] Also[3] if proceedings are taken in any Court by a registered money lender to recover money lent after 1st November, 1900, or to enforce any agreement or security, made or taken after 1st November, 1900, in respect of money lent before or after the Act, *and* the interest, fines, bonuses, or other charges are excessive, *and* the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief—the Court may reopen the transaction, and take an account, and give relief from payment of any excessive amount, and generally may set aside, revise, or alter the transaction. And the same section enables the borrower or surety or other person liable, to himself bring an action for relief under the Statute. The Statute has greatly widened the old jurisdiction of Equity,[4] as the third essential for relief is that the transaction must *either* be harsh and unconscionable *or* otherwise such as Equity relieved against; and each case is to be considered on its merits—as to the necessities of the borrower, his pecuniary position and business aptitude, the presence or absence of security, the relation of the borrower to the lender, and the money lender's profit.[4]

Saunders v. *Newbould.*

Fraud only renders transaction voidable.

Although an actual fraud is practised, the transaction is not thereby rendered void, but it is voidable at the option of the person who has been

[1] 63 & 64 Vict., c. 51.

[2] *Victoria Daylesford Syndicate* v. *Dott* (1905), 2 Ch., 624; 74 L. J., Ch., 673; 93 L. T., 627.

[3] 63 & 64 Vict., c. 51, sec. 1.

[4] *Re Debtor* (1903) 1 K. B., 705; 72 L. J., K. B., 382; 88 L. T., 401; *Bonnard* v. *Dott*, 92 L. T., 822; *Poncione* v. *Higgins*, 21 T. L. R., 11; *Park* v. *Bond*, 93 L. T., 49; *Victoria Daylesford Syndicate* v. *Dott*, *supra*; *Saunders* v. *Newbould*, W. N., 1906, p. 157; *Law Students' Journal*, August, 1906, p. 166.

defrauded.[1] And a person on whom a fraud has been practised, may lose the right of avoiding the transaction, if a third person, innocently and for value, acquires an interest in the matter, for the rule is, that where one or two innocent parties must suffer by the fraud of a third person, that one shall be the sufferer who has, however innocently, put it in the power of a third person to perpetrate the fraud.[2] Thus, A on the faith of B's representation, which is false, signs a receipt, and C on the faith of this receipt pays certain money, *e.g.*, completes a purchase; here A must suffer, and not C. In one case the plaintiff, who was an illiterate man, had executed a mortgage to his solicitor, believing it to be merely a formal document to enable the solicitor to raise money on the property. The solicitor then obtained money on a deposit of the deeds, and appropriated it to his own purposes, and the question was whether the plaintiff, or the depositee, had the better right or title. The Court held that the equity of the depositee was superior to that of the plaintiff, for he, though an innocent person, had placed it in the power of the wrong doer to perpetrate the fraud.[3]

Which of two innocent parties to suffer by fraud of a third party.

French v. *Hope.*

Constructive fraud has already been defined, and the distinction between it and actual fraud explained[4]; and it may also, upon that distinction, be observed, that the doctrine of relief on the ground of constructive fraud, is founded on an anxious desire of the Court to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed. By disarming the parties of

Constructive fraud.

Foundation of relief.

[1] *Oakes* v. *Turquand*, L. R., 2 H. L., 325.
[2] *Hunter* v. *Walters*, L. R., 7 Ch. Apps., 75.
[3] *French* v. *Hope*, 56 L. J., Ch., 363; 56 L. T., 57. See also *King* v. *Smith* (1900), 2 Ch., 425; 69 L. J., Ch., 598; 82 L. T., 815. See also *ante*, pp. 220.
[4] See *ante*, p. 242.

all legal sanction and protection for their acts, the Court suppresses the temptations and encouragements, which might otherwise be found too strong for their virtue.[1]

Constructive frauds as being against the policy of the law.

Some of the cases coming under the head of constructive fraud are principally so treated because they are contrary to some general policy of the law, *e.g.*, marriage brokage contracts, contracts or conditions in restraint of marriage, frauds on marriages, and agreements to influence testators.

Marriage brokage contracts.

A marriage brokage contract is an agreement whereby a person engages to pay another a sum of money to bring about a marriage. It is firmly established that all such contracts are utterly void, as against public policy, so much so as to be deemed incapable of confirmation, and the Court will even allow money paid under them to be recovered back.[2] Thus, a lady aged thirty-three, agreed with the owner of a matrimonial paper that the latter should assist her to find a husband and that she should then pay him £250, and she did pay him another £52 as a special fee, of which £47 was to be returned after nine months unless she was engaged or married; and after four months the lady sued for her £52 back again—and the Court of Appeal held she was entitled to have it back.[3] Upon the same principle every contract by which a parent or guardian obtains any security for promoting or consenting to the marriage of his child, or ward, is void.[4]

Hermann v. *Charlesworth.*

Conditions in restraint of marriage.

Provisions in the nature either of direct contracts, or of conditions annexed to legacies, or other gifts of personal property, which are in general restraint of

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[1] Story, 166, 167.
[2] *Ibid.*, 168.
[3] *Hermann* v. *Charlesworth* (1905), 2 K. B., 123; 74 L. J., K. B., 620; 93 L. T., 284.
[4] 1 Wh. & Tu., 573.

marriage, are (except in the case of such a condition attached to a gift to a widow or a widower[1]) bad, as being against public policy. Thus, in one case, a testator who by his will had given the residue of his personal property to his daughter for life, and afterwards to her children, in a codicil expressed a wish that his daughter should not marry, and directed that on her marriage, or death, the property given to her and her children, should go over to another person. It was held that the gift over on marriage was void as to the daughter's life interest, and that she did not lose the property by marrying.[2] Further, when the daughter, having married, afterwards died leaving children, it was also held that the gift over was void against the children, who were therefore entitled to the property.[3] And even if a condition is not in general restraint of marriage, but still is of so rigid a nature that the party against whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like rule, *e.g.*, where a legacy was given to a daughter upon condition that she should not marry anyone who was not possessed of freehold property of the clear yearly value of £500.[4] A condition which is, however, strictly in limited restraint of marriage, *e.g.*, with a Scotchman, or a domestic servant, or a papist, or A. B., is always good, even as regards personalty if there is a gift over but not without. Further, a condition, even in general restraint of marriage is good, if it is annexed to a gift to a widow,

Morley v. *Rennoldson*.

Limited restraint.

[1] See 1 Wh. & Tu., 560.

[2] *Morley* v. *Rennoldson*, 2 Hare, 570.

[3] *Morley* v. *Rennoldson* (1895), 1 Ch., 449; 64 L. J., Ch., 485; 72 L. T., 308. But if personalty is given by deed or will in trust for a daughter for life and then for her children, with a condition subsequent to forfeit such gift if she marries without the consent of A B, and she does marry without such consent, the interests of her children are defeated as well as her own. (*Re Whiting* (1905), 1 Ch., 96; 74 L. J., Ch., 207; 91 L. T., 821).

[4] See 1 Wh. & Tu., 554.

or a widower, provided that as to personalty there is a gift over. As regards realty, the position is somewhat different, for there a condition in limited restraint of marriage is always good, even though there is no gift over; and if the condition is in general restraint of marriage, it would appear that this is equally the case, except that a condition subsequent in restraint of marriage is void in the case of a tenancy in tail, because it is repugnant to that estate.[1] This difference between realty and personalty is very striking, and is explained by the fact that, as regards personalty, the rules of the Civil Law govern, whilst as to realty, the rules of the Common Law prevail. Where, therefore, there are distinct gifts of realty and personalty, and conditions in restraint of marriage are annexed to each, different rules exist. If, however, a testator has blended both realty and personalty together, and has imposed some condition in restraint of marriage, then it has been held that the rule as to personalty prevails.[2] Thus where a testator gave to his widow all his property, both real and personal, on condition that she did not marry again, but there was no gift over in the event of her remarriage, it was held that the restraint on marriage was simply *in terrorem* and therefore bad as to such part of the estate as consisted of personalty, and that as to that part of the estate which was realty, as the testator had blended together his realty and personalty in one gift to the same person, the restraint was equally void as to the realty.[3]

Bellairs v. *Bellairs.*

Frauds on marriages.

A fraud on a marriage signifies some concealment, or misrepresentation, whereby some person is misled, or by reason whereof certain acts, intended to be

[1] See notes to *Scott* v. *Tyler*, 1 Wh. & Tu., 558, 559.
[2] *Bellairs* v. *Bellairs*, L. R., 18 Eq., 510; 43 L. J., Ch., 669.
[3] *Pettifer* v. *Pettifer*, W. N. (1900), 182, following *Bellairs* v. *Bellairs*, L. R., 18 Eq., 510. See further as to conditions in restraint of marriage, *Scott* v. *Tyler*, and Notes, 1 Wh. & Tu., 535-576.

of effect, are reduced to mere forms, or become inoperative. Thus, a parent declined to consent to the marriage of his daughter with the intended husband, on account of his being in debt and his brother, therefore, gave a bond for the debts, and thus the desired consent was procured, and the marriage took place. The husband had, however, by arrangement with his brother, secretly given him a counter-bond, but the Court held it was a fraud upon the marriage, and must be considered as a nullity.[1]

Redman v. *Redman.*

Any agreement having for its design the using influence, or power, to induce a person to make a will in a certain way is bad, for all such contracts tend to the deceit and injury of third persons, and encourage artifices, and improper attempts, to control the exercise of a testator's free judgment.[2] Thus, a bond given by A to B, to pay a certain sum in consideration of B using his persuasive influence over C, to induce C to leave A a legacy, would be void. And contracts made during the lifetime of a testator, by persons who are in expectation of receiving benefits under his will, under which they agree to divide amongst them any such benefits they may receive under it, if they in fact and substance amount to agreements to bring influence to bear upon the testator, are bad; but such contracts are good, if they merely amount to agreements to divide all that the parties may get, and to abstain from interfering with the testator, for here no influence is intended to be brought to bear on the testator, and the agreement cannot be truly said to disappoint his intentions if he does not impose any restrictions on his legatees.[3] Therefore, where three persons,

Agreements to influence testators.

[1] *Redman* v. *Redman*, 1 Vern., 348; Story, 168, 169; 1 Wh. & Tu., 574.

[2] Story, 169. [3] *Ibid.*, 169.

Higgins v. *Hill.*

who all expected benefits under a certain person's will, had agreed for a division of all such benefits in certain shares and proportions, it was held that this agreement was good, and that what came to them under the will must be divided according to the agreement.[1]

Other instances.

These particular cases given show sufficiently the nature of constructive frauds which are so on account of the policy of the law, and others that may in addition be mentioned, are the following:—Contracts in general restraint of trade; contracts involving champerty or maintenance[2]; contracts for the buying or selling of public offices.

When constructive fraud renders transaction not voidable only, but void.

Where any contract or conveyance is considered by the Court to amount to a constructive fraud, by reason of being opposed to some positive law or to principles of public policy, it is void altogether, and incapable of ratification, for *Quod ab initio non valet, in tractu temporis non convalescit*; in which respect there is a difference from the rule in cases of actual fraud, and other cases of constructive fraud, in which the matter is voidable only, and is capable of confirmation.[3]

Constructive frauds on account of confidential or fiduciary relationships.

Other cases coming under the head of constructive fraud, are so treated because of a peculiar confidential, or fiduciary, relationship existing between the parties. In this class of cases there is often to be found the actual design of perpetrating a fraud, and then the matter is properly styled actual fraud; but it is only desired here to consider the effect which may be produced by the bare existence of some such relationship.

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[1] *Higgins* v. *Hill*, 56 L. T., 426.
[2] See *James* v. *Kerr*, 40 Ch. D., 449; 58 L. J., Ch., 355; 60 L. T., 212.
[3] Story, 196, 197; *ante*, p. 248.

Trustees.

It has already, in treating of the position of trustees,[1] been pointed out that they are not allowed to make any profit out of their trust estate, or generally to purchase of their *cestuis que trustent*. Here the whole principle depends on the doctrine of constructive fraud, for the Court considers that, irrespective of unfair dealing, the position is such that the making of a profit, or purchasing, cannot be allowed, and, on preventive principles, it lays down an almost hard and fast rule, that it is to be considered that a fraud has been committed.

Other confidential positions.

The same idea pervades the relationship of solicitor and client, and, indeed, other relationships of a confidential nature, or in which one party naturally occupies a dominant position over the other, *e.g.*, in the case of counsel and clients, agents and their principals, promoters and directors of companies, medical men and their patients, parents and children, ministers of religion and those confiding in them, and, indeed, every case in which influence is acquired and abused, or confidence is reposed and betrayed.[2] In all these cases, if the Court finds a person occupying a fiduciary or quasi-fiduciary capacity, or any position which induces confidence from another or confers influence over another, and then the Court also finds the person occupying such a position getting some benefit, it will always require that person to remove the cloud of suspicion which, from the circumstances, naturally attaches to the transaction, and to show that he has not obtained what he has got through the position he occupied. Thus, in *Lyon* v. *Home*,[3] the plaintiff was a widow lady of advanced years, living alone, and possessed of considerable wealth,

Huguenin v. *Baseley*.

Lyon v. *Home*.

[1] *Ante*, pp. 101, 102.
[2] See hereon *Huguenin* v. *Baseley*, 1 Wh. & Tu., 247.
[3] L. R., 6 Eq., 655; 37 L. J., Ch., 674.

and the defendant was a person who professed to be a "medium" of communications between living persons and the spirits of the departed. The plaintiff, being much attached to the memory of her deceased husband, sought out the defendant with the view of using his mediumistic powers, and he, by means of what he professed to be spiritual manifestations of her deceased husband, produced through him, obtained great ascendancy over her mind, and she adopted him as her son, and made a settlement upon him. Subsequently, however, the plaintiff lost faith in the defendant's spiritual powers, and brought this action to set aside the settlement. The Court held that the onus of supporting the settlement rested entirely on the defendant, and that it was obligatory on him to prove that the plaintiff's acts were the pure, voluntary, well-understood acts of her mind, unaffected by the least speck of imposition or by the influence the defendant had acquired; and, the defendant being unable to prove this, the settlement was set aside.

Allcard v. *Skinner*.

Allcard v. *Skinner* is a modern case illustrative of this same principle, though on the particular facts of that case, the benefit derived by the persons occupying the position of confidence, or influence, was not taken away from them. The plaintiff there was a lady who, in 1871, joined a Protestant sisterhood, and bound herself to their rules of poverty, chastity, and obedience, and made over all her property to the sisterhood. She ultimately, however, grew tired of the sisterhood, and in 1879 she left it. Then, in 1885, she brought this action, claiming to have her property restored to her. The Court of Appeal held that, with regard to any property remaining, and not expended for the purposes of the sisterhood, the plaintiff having, when she made the gift, been under the influence of the defendants, who were the heads

of the sisterhood, would, had she, after leaving the sisterhood and becoming a free agent, come promptly to the Court, have been entitled to have had the gift set aside, and such property restored to her; but that, by reason of the time that had elapsed, she was bound by her laches and acquiescence, and the Court refused to interfere.[1]

Solicitor and client.

To take, also, particularly the position of solicitor and client, though the solicitor is not absolutely incapable of contracting with his client, even whilst that relationship is existing, yet on account of that position, any transaction between them is viewed with jealousy by the Court, and the onus of supporting it is on the solicitor. To support it, the solicitor must be prepared to show the perfect fairness and propriety of the transaction, or that the client had independent advice; and in both cases that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger.[2] And upon this same principle of protection of the client against the power of the solicitor, the Court formerly always refused to allow a security given for future costs to stand, although it would allow it to stand if given for costs already incurred.[3] However, now, by statute a solicitor may take security from his client, either for past or for future costs,[4] and he is allowed, subject to certain restrictions, to contract with his client as to his remuneration.[5] Generally in all dealings with his client, the solicitor must protect him; so that if he takes a mortgage from his client which

Solicitor must protect client.

[1] *Allcard* v. *Skinner*, 36 Ch. D., 145; 56 L. J., Ch., 1052; 57 L. T., 61. See also *ante*, pp. 23-25.
[2] Story, 199, 200.
[3] 2 Wh. & Tu., 629.
[4] 33 & 34 Vict., c. 28, sec. 16.
[5] *Ibid.*, sec. 4; 44 & 45 Vict., c. 44, sec. 8.

Cockburn v. *Eawards.*

contains any unusual provisions—*e.g.*, an immediate power of sale—he must specially point this out to the mortgagor,[1] unless, indeed, it is evident from the transaction that such immediate power was intended.[2] And it has been held that the rule which forbids a solicitor to buy his client's property, without full and complete disclosure, applies to the case of a solicitor purchasing from the trustee in the bankruptcy of his client.[3] If, however, a solicitor, fairly and honestly, applies to and obtains leave from the Court, to bid at a sale, that relieves him from the liability attaching to his fiduciary character, and places him in the same position as an ordinary purchaser.[4] It was formerly held that a solicitor who took a mortgage from his client, could not charge his costs in connection with such mortgage, he being the mortgagee,[5] unless there was an express contract by the client to pay them[6]; and also that a solicitor who acted for himself, or for himself and a co-mortgagee, in a redemption suit, was only entitled to out-of-pocket expenses, and not to any profit costs.[7] These decisions were, however, overruled by the Mortgagees Legal Costs Act 1895,[8] which provides that a solicitor mortgagee, as regards mortgages made since 6th July 1895, may charge his ordinary costs for acting in, negotiating,

Coaks v. *Boswell.*

As to solicitor mortgagees.

Mortgagees Legal Costs Act 1895.

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[1] *Cockburn* v. *Edwards*, 18 Ch. D., 449; 51 L. J., Ch., 46.

[2] *Pooley's Trustee* v. *Whetham*, 35 Ch. D., 111; 55 L. J., Ch., 899; 55 L. T., 833.

[3] *Luddy's Trustee* v. *Peard*, 33 Ch. D., 500; 55 L. J., Ch., 884; 55 L. T., 137.

[4] *Coaks* v. *Boswell*, L. R., 11 App. Ca., 232; 55 L. J., Ch., 761; 55 L. T., 32.

[5] *Re Roberts*, *Ex parte Evans*, 43 Ch. D., 52; 59 L. J., Ch., 25; 62 L. T., 33.

[6] *Ex parte Lickorish*, *Re Wallis*, 25 Q. B. D., 176; 59 L. J., Q. B., 500; 62 L. T., 674.

[7] *Stone* v. *Lickorish* (1891), 2 Ch., 363; 60 L. J., Ch., 289; 64 L. T., 79; *Re Doody*, *Fisher* v. *Doody* (1893), 1 Ch., 129; 62 L. J., Ch., 14; 67 L. T., 650. However, a solicitor acting for himself in an ordinary action, and succeeding, is entitled to charge the same costs substantially as if he had appeared for a third person (*London Scottish Benefit Society* v. *Chorley*, 13 Q. B. D., 872; 53 L. J., Q. B., 551).

[8] 58 & 59 Vict., c. 25.

and completing the mortgage [1]; and also, whenever the mortgage was made, may charge against the mortgagor, or the security, for all work done as a solicitor subsequent to the mortgage in relation thereto, or to the security, whether such work was done before or after the passing of the Act, and that no mortgage shall be redeemed except upon payment of such costs.[2]

Solicitor must never purchase secretly.

A purchase by a solicitor from his client, made secretly in the name of another, so that the client does not know that it is the solicitor who is purchasing cannot be maintained, even though it is a fair purchase.[3] "Though there has been the completest faithfulness and fairness, the fullest information, the most disinterested counsel, and the fairest price, and though the client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interests can be allowed to exist."

Gift to solicitor.

A solicitor is absolutely incapable of taking a gift *inter vivos* from a client, whilst the relationship exists, unless the client has competent and independent advice, or unless indeed it is of a trifling character, when the Court will not interfere, for *de minimis non curat lex.*

Wright v. *Carter.*

In dealing with the case of a gift *inter vivos* by a client to a solicitor, the Court starts with a

[1] 58 & 59 Vict., c. 25, sec. 2. This includes the scale fee for negociating the mortgage (*Re Norris* (1902), 1 Ch., 741; 71 L. J., Ch., 187; 86 L. T., 616). [2] Sec. 3.

[3] *McPherson* v. *Watt*, 3 App. Ca., 254; Brett's Eq. Cas., 76.

presumption of undue influence on the part of the solicitor, continuing so long as the relationship of solicitor and client, or the influence attributable thereto, continues. The presumption is not irrebuttable, but the onus is on the solicitor of showing that the gift was uninfluenced by his position of solicitor. The fact that the donor had the competent independent advice of a different solicitor is material, as tending to show that the influence had ceased. But the new solicitor called in must not only satisfy himself that the donor understands what he is doing, and does it of his own free will; he must also satisfy himself as to the donor's financial position, and as to the circumstances under which the transaction is taking place, and that the gift is a proper one for the donor to make under all the circumstances of the case, because without doing all this he cannot be in a position to give competent independent advice. The fact that the donee continues to act as the donor's solicitor in other matters, suggests the inference that his influence has not ceased with respect to the gift.[1] And the foregoing rules have also been held to apply to the case of a gift to the solicitor's wife,[2] and also to his son,[3] and presumably, therefore, to any other relative or connection of the solicitor in whose welfare he is naturally interested. But such a gift may stand if there has been a complete severance of the confidential relation,[4] or it can be shown that, after the relationship had ended, the client did something amounting to a release of his right to set aside the gift[5]; thus,

[1] *Wright* v. *Carter* (1903), 1 Ch., 27; 72 L. J., Ch., 138; 87 L. T., 624.
[2] *Liles* v. *Terry* (1895), 2 Q. B., 679; 65 L. J., Q. B., 34; 73 L. T., 428.
[3] *Willis* v. *Barron* (1902), A. C., 271; 71 L. J., Ch., 609; 86 L. T., 805.
[4] *Tomson* v. *Judge*, 3 Drew, 306; *Morgan* v. *Minett*, 6 Ch. D., 638.
[5] *Tyars* v. *Alsop*, 37 W. R., 339; 61 L. T., 8.

say that the client, after the termination of the relationship, freely executes a deed of release of his right to set the gift aside. And if a person who has made a gift to a solicitor, whilst the relationship of solicitor and client subsisted between them, is entitled at the time of his death to have the gift set aside, his personal representative succeeds, on his death, to the same right that he had; and this is so though it can be shown that the deceased had no intention of exercising the right, and had even expressed a determination not to do so, for he might have changed that determination the very next day, and would have had a perfect right to do so.[1] There is, however, nothing to prevent a solicitor taking a benefit from a client under his will[2]; and generally, with regard to the rule of Equity in relation to gifts *inter vivos*, by which fraud is presumed when they are obtained from persons standing in certain relations to the donors, such rule has been held not to be applicable to gifts by will.[3] Still, of course, the fact of the particular relationship existing, may give rise to suspicion of undue influence used by the party in procuring the will, and may afford material for a probate action, in which on the ground of undue influence it is sought to set the will aside.[4]

Tyars v. *Alsop.*

The relation of principal and agent naturally shows the existence of confidence, and the position of such

Principal and agent.

[1] *Tyars* v. *Alsop*, 37 W. R., 339; 61 L. T., 8. See also hereon Poley's Law affecting Solicitors, 218-222.

[2] It may be noticed that a declaration in a will, that a solicitor who is an executor, or trustee, of the will shall be entitled to make his charges as a solicitor, for work done in connection with the testator's estate, has been held to confer a beneficial gift or interest on him and therefore he loses the benefit if he is one of the attesting witnesses to the will (*Re Pooley*, 40 Ch. D., 1; 58 L. J., Ch., 1; 60 L. T., 73). Although, under the provisions of a will, a solicitor executor may be entitled to charge profit costs, this is not so if the estate is insolvent. (*Re White, Pennell* v. *Franklin* (1898), 1 Ch., 297; 67 L. J., Ch., 139.)

[3] *Parfitt* v. *Lawless*, L. R., 2 P. & D., 462; 41 L. J., P., 68.

[4] See *Fulton* v. *Andrew*, 7 H. L. Ca., 449; 44 L. J., P., 17; *Parker* v. *Duncan*, 62 L. T., 642; *Brown* v. *Fisher*, 63 L. T., 465.

parties is therefore affected by the same considerations. The rule is, that agents are not permitted to become secret vendors, or purchasers, of property which they are authorised to buy, or sell, for their principals, or by abusing their confidence to acquire unreasonable gifts or advantages; or indeed to deal with their principals in any case, except when there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition. Upon these principles if an agent sells to his principal his own property, as the property of another, without disclosing the fact, the bargain, at the election of the principal, will be held void; and if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer.[1]

Directors and promoters of companies.

The position of a director of a company as regards the shareholders, is that of agent to a principal, and, therefore, the above remarks apply to him[2]; and a promoter of a company also occupies an analogous position.[3] A promoter may be defined as a person who sets in motion the machinery by which the Companies Acts provide that incorporated companies can be created, and such a person, by the necessity of the case, is in a fiduciary position to the company he forms, since he is the creator of it.[4]

Who is a promoter.

Guardian and ward.

Transactions between guardian and ward fall under the general principles now under consideration. Any donation from a ward to a guardian is looked upon with much jealousy, and if obtained during the guardianship, or immediately after the ward has attained majority, it will be set aside; and this is

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[1] Story, 207.

[2] *Imperial Mercantile Credit Association* v. *Coleman*, L. R., 6 H. L., 189; 42 L. J., Ch., 689.

[3] *New Sombrero Phosphate Company* v. *Erlanger*, L. R., 3 App. Ca., 1218; 48 L. J., Ch., 73.

[4] Story, 214.

so even though a considerable time has elapsed between attaining the majority and making the gift, if it can be shown that the guardian still retained influence over his former ward.[1] And much the same doctrine applies as between parent and child, for donations from the child to the parent are always looked upon jealously, and will usually be set aside if any advantage has been taken of the parental position; and particularly is this so when the child has only just come of age. But if a transaction between parent and child is reasonable, and entered into willingly, the Court will not interfere. Thus, in one case,[2] a son, in plentiful circumstances, gave his father a bond to pay him an annuity during his life, and it was held that, as it appeared to have been the free act of the son, and what he then thought himself bound in honour to do, it ought not to be set aside in Equity, there being no proof of fraud, but merely the circumstance of the relationship.[3]

Parent and child.

Where such a relationship exists between two parties as will induce the Court to hold that a transaction between them is incapable of being supported, on the ground of constructive fraud, any one who derives any interest through, or out of, the transaction will equally be affected by the doctrine, if he has actual or constructive notice of the circumstances. Thus, in one case, a father, being threatened with bankruptcy proceedings, persuaded a daughter, recently of age, to mortgage a reversion she was entitled to, for his benefit. She had no independent adviser, and the mortgage was prepared by the father's solicitor, who also acted for the mortgagee. Subsequently, the daughter sued to set

Position of third parties.

De Witte v. *Addison.*

[1] 1 Wh. & Tu., 272, 273.
[2] *Blackborn* v. *Edgeley*, 1 P. Wms., 600.
[3] 1 Wh. & Tu., 270, 271.

aside the mortgage. The Court held that the transaction was set in motion by the father, and carried out by his influence over his daughter and that the mortgagee had notice of the circumstances through having acted by the same solicitor, and the mortgage was accordingly set aside.[1] Of course, if the mortgagee could not have been charged with notice of the circumstances, his position could not have been impugned.[2] Independent advice may, however, enable a transaction to stand, where but for it, it would not; but it must be really independent advice. In a recent case it was held that if a solicitor, purporting to act as the independent adviser of a youthful donor about to make an irrevocable voluntary settlement on a donee standing in a fiduciary relationship to the donor, acts also in the same transaction as solicitor to the donee, then he is not such an independent adviser as the Court, under the circumstances, requires for the protection of the donor. It was laid down also that a solicitor who acts for such a donor does not discharge his duty by merely satisfying himself that the donor understands and wishes to carry out the particular transaction—he must also satisfy himself that the transaction is right and proper under all the circumstances.[3]

Powell v. *Powell.*

Persons engaged to be married.

The position existing between a man and woman engaged to be married is such that in gifts, and other similar transactions between them, some presumption of fraud arises; and on account of the probable influence possessed by the man, the Court will require satisfactory evidence that such influence has not been improperly used.[4] So also there may be many other cases in which a transaction may amount

[1] *De Witte* v. *Addison*, 80 L. T., 207.
[2] *Bainbrigge* v. *Browne*, 18 Ch. D., 188; 50 L. J., Ch., 522.
[3] *Powell* v. *Powell* (1900), 1 Ch., 243; 69 L. J., Ch., 164; 82 L. T., 24. And see *Wright* v. *Carter*, *ante*, pp. 259, 260.
[4] *Page* v. *Horne*, 11 Beav., 227.

to a constructive fraud, on account of the dominant position of one of the parties to it.[1]

General position of volunteers.

And even though there is no special and peculiar position existing between the parties, yet it is a general rule that if a voluntary settlement is attacked, and sought to be set aside on the ground of fraud, undue influence, or the like, the burthen of proving that the transaction was fair and honest is on the party taking the benefit thereunder.[2]

Constructive frauds on account of the peculiar position of the person seeking relief.

A third class of cases coming under the denomination of constructive fraud, are those which are so considered because of the peculiar position in which the person stands who is seeking relief, irrespective of any special or peculiar position of the other party, *e.g.*, in the case of dealings with expectant heirs.

Expectant heirs.

By an expectant heir is here meant an adult who has either some reversionary estate, or who has, at any rate, an expectancy of some future benefit. Thus, if an estate is limited to A, and then to B, B is during A's life an expectant; and so also if B merely has expectations that his father will leave him a fortune, he is an expectant, but he may here be styled a bare expectant, whilst in the former case he is something more, for he has an estate actually limited to him, though he cannot yet enjoy it. The same principles apply to both, subject only to this, that it is provided by the Sales of Reversions Act 1867[3] that no purchase of a reversionary interest made *bonâ fide* and without fraud or unfair dealing, shall be set aside only on the ground of undervalue; and the word "purchase" includes any contract, conveyance, or assignment under or by which any

31 Vict., c. 4.

[1] See *Harvey* v. *Mount*, 8 Beav., 439.
[2] *Hoghton* v. *Hoghton*, 15 Beav., 299.
[3] 31 Vict., c. 4.

Effect of this statute.

beneficial interest in any kind of property may be acquired. Therefore, if there is an honest sale or mortgage of a reversionary interest, this is now always good, unless some fraud or unfair dealing can be shown; and if the transaction is in fact an utterly unconscionable one, here there is, in this circumstance, evidence of fraud and unfair dealing, and such a transaction is as liable to be upset now as it was before the Statute.[1] Therefore, practically, sales or mortgages of reversions may be set aside, in some cases, by reason of the inadequacy of the consideration, when that inadequacy is great, not simply because of the undervalue, but because the fact of there being such undervalue produces a presumption of fraud, or unfair dealing; that is, the Court uses the undervalue as an index to the underlying fraud.[2] And where the circumstances attending the dealing with a reversion raise a presumption of fraud, the onus is on the purchaser to prove that the transaction was in fact fair, just, and reasonable[3]; but if this can be proved, then the purchaser is protected by the Sales of Reversions Act 1867, as the sale cannot be set aside merely because the purchaser has got a bargain.

The principle of relief to expectants.

When dealings with expectants good.

The principle on which the Court construes dealings with expectant heirs, of an unconscionable nature, to be frauds, is that from their circumstances, weakness on the one side, and extortion on the other, can be presumed.[4] Therefore, to render a bargain with an expectant good, it is necessary for the person dealing with him to prove either (1) that the transaction was reasonable, and fair, when it

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[1] *Earl of Aylesford* v. *Morris*, L. R., 8 Ch. Apps., 484; 42 L. J., Ch., 546; Brett's Eq. Cas., 70; *Miller* v. *Cook*, L. R., 10 Eq., 641 40 L. J. Ch., 11.

[2] See *Brenchley* v. *Higgins*, 70 L. J., Ch., 788; 83 L. T., 751.

[3] *Fry* v. *Lane*, 40 Ch. D., 312; 58 L. J., Ch., 113; 60 L. T., 12.

[4] *Earl of Chesterfield* v. *Janssen*, 1 Wh. & Tu., 289.

will stand; or (2) that it was made known to and approved by the person to whose estate the expectant hoped to succeed, when, although it does not necessarily follow that it will stand, there yet arises a presumption of its fairness.[1] It is manifestly unlikely that either circumstance can be proved in cases which are brought before the Court.

Post-obit bonds form a method of dealing with expectants, which are almost always bad as constructive frauds. A *post-obit* bond may be defined as an agreement made, on the receipt of money by the obligor, to pay a sum exceeding the sum so received and the ordinary interest thereon, on the death of the person upon whose decease he expects to become entitled to some property.[2]

Post-obit bonds.

The doctrine of the Court with regard to dealings with expectants has only the effect of making transactions entered into with them voidable, and so they are capable of confirmation after the peculiar position has ceased to exist; for, if the person is no longer an expectant, he can by his own free and deliberate act confirm and render perfectly valid the transaction which he had a right to question.[3] This is well shown by the leading case of *Earl of Chesterfield* v. *Janssen*, just cited. There, one Mr. Spencer, at the age of 30, had borrowed £5,000 of the defendant, on the terms of paying £10,000 if he survived his grandmother, from whom he had large expectations, and who was then of the age of 78 years, and nothing if he did not. He did survive her, and after her death he gave a bond for the payment of the £10,000 and paid a part. Mr. Spencer having since died, his

Confirmation by expectant.

Earl of Chesterfield v. *Janssen.*

[1] *Earl of Aldborough* v. *Frye*, 7 Cl. & F., 456; *Tyler* v. *Yates*, 6 Ch., 665; *King* v. *Hamlet*, 4 Sim., 223; *Beynon* v. *Cook*, 10 Ch., 389. See also Story, 219-227.

[2] Story, 227.

[3] *Earl of Chesterfield* v. *Janssen*, 1 Wh. & Tu., 289.

executor sought to be relieved from the liability, and it was held that, though the Court would originally have relieved, it would not do so now, because the expectant had, by his own voluntary act, after he had ceased to be an expectant, ratified the transaction. And without any express act of confirmation, if the position of expectancy ceases to exist, and the party lays by some time without enforcing his right to have the transaction set aside, the Court will refuse to interfere, on the principle, *Vigilantibus non dormientibus æquitas subvenit.*[1]

Laches or acquiescence.

An expectant seeking relief must do equity.

With regard also to the relief that the Court gives to an expectant, the maxim, "He who seeks Equity must do Equity,"[2] must be borne in mind, and the rule is that the Court will only set aside the transaction on the terms of repayment of the money actually advanced with fair interest thereon, usually 5 per cent. per annum.[3] As regards the costs of the action, they are, as in ordinary cases, in the discretion of the Court, and sometimes, where the only ground was undervalue, the plaintiff has been relieved on payment of costs; in some cases no costs have been given, and in others the costs have been thrown upon the defendant.[4]

Cases of general expectancy.

The principle of the Court with regard to relief to expectants has been applied to cases where the expectancy is not to any direct property, but is only of a general character, *e.g.*, where a man has no property, or direct prospect of any, but his father, or other relative, is in a good position, and an unconscionable transaction is entered into in the expectation that the father, or other relative, will

[1] *Gerrard* v. *O'Reilly*, 3 Dru. & W., 414; *ante*, pp. 23-25.
[2] See *ante*, pp. 19, 20.
[3] *Earl of Aylesford* v. *Morris*, L. R., 8 Ch. Apps., 484; 42 L. J., Ch., 546; Brett's Eq. Cas., 70.
[4] Per Kay, J., in *Fry* v. *Lane*, *ante*, p. 266.

come forward and help him rather than see him made a bankrupt.[1]

The provisions of the Money Lenders Act 1900[2] have already been referred to,[3] as also the construction put upon it.[4] The only sense in which it has any special bearing on the position of an expectant is, that where the borrower occupies that position, there is such a state of things existing as would have formerly enabled the Court to give relief, and therefore the Act certainly applies.

Common sailors.

As another instance of this kind of constructive fraud may be mentioned the case of common sailors, who are considered by the Court as being so extremely improvident a class of men as to require some guardianship all their lives. Equity, therefore, treats them much in the same light as expectant heirs, and relief is generally afforded against contracts respecting their prize money or wages, whenever any inequality appears in the bargain, or any undue advantage has been taken.[5]

Virtual frauds on individuals.

There are, in addition to the classes of cases we have now considered as coming under the heading of constructive fraud, some others in which the transaction is held by the Court to be a fraud, because virtually it would operate to work some wrong, or because it is contrary to some Statute. It may be well to mention some such cases.

Secret compositions.

Any secret agreement entered into by a debtor with one of his creditors, to give him some benefit to induce him to accept a composition, or to act in

[1] *Nevill* v. *Snelling*, 15 Ch. D., 679; 49 L. J., Ch., 777; 43 L. T., 244.
[2] 63 & 64 Vict., c. 51.
[3] *Ante*, p. 248.
[4] *Ibid.*
[5] Story, 219.

some particular way in his bankruptcy, is considered bad, as virtually operating as a fraud upon the other creditors.[1] Voluntary settlements or other dispositions which are, on account of their voluntary nature, held bad under the provisions of 13 Eliz., c. 5 (a subject which has already been dealt with[2]), come strictly under the head of constructive fraud, as operating as virtual frauds on creditors.

Frauds under 13 Eliz., c. 5.

Frauds on powers.

If a person has a special power of appointment, he must, if he executes it at all, execute it *bonâ fide* for the direct end for which it was created, and in so far as he fails in doing this, he virtually defrauds the objects of the power, and his execution is bad as a fraud.[3] Thus, if although the appointor appoints to an object of the power, yet it is under some private arrangement that he, the appointor, shall receive part for his own benefit, this is bad; and even though there is not such a direct arrangement at the time of the appointment, but the intention of the appointor is that a certain course shall be taken with regard to a part of the fund appointed, not authorised by the power, and shortly after appointment such course is taken, this also is a fraud.[4] So, if a person has a power of appointing a fund amongst his children, and he appoints to an infant child who is not in want of the appointment, and who is seriously ill, so that he, the father, will, in the probable event of the child's death, be entitled as his next-of-kin, this will ordinarily be deemed a fraudulent appointment.[5] It does not, however, necessarily follow that every appointment by a parent to an infant child, which there was no necessity for at the time, must be

Topham v. *Duke of Portland*

Appointment to an infant child.

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[1] Story, 244.
[2] See *ante*, pp. 43-46.
[3] *Aleyn* v. *Belchier*, 2 Wh. & Tu., 308.
[4] *Topham* v. *Duke of Portland*, 1 De G., J. & S., 517.
[5] *Hinchinbrook* v. *Seymour*, as stated by Jessel, M.R., in *Henty* v. *Wrey*, 21 Ch. D., 332; 53 L. J., Ch., 667; 47 L. T., 231.

deemed a fraud ; it all depends on the circumstances of the case. But it may safely be stated that such appointments are viewed with suspicion, and that very little additional evidence of improper motive or object will induce the Court to treat the appointment as invalid, and set it aside, but without some additional evidence the Court cannot do so.[1] In all such cases as these, in which the appointment is set aside, this is done because, although nominally the appointment is in accordance with the terms of the power, yet the design underlying the matter renders the transaction a virtual fraud on the other objects of the power.

Re Deane Bridger v. *Deane.*

The matter may be illustrated further by a case, in which a settlor assigned a policy of insurance on his own life, to trustees, upon trust, after his death, for his three children, A, B, and C, in such shares as he should appoint, and, in default of appointment, to them equally, and he covenanted to keep up the policy. The settlor, some time subsequently, exercised his power of appointment entirely in favour of the child A, who then surrendered the policy to the insurance office for £897, which she handed over to her father, the settlor, who kept the money, except the sum of £150 which he gave A out of it. The settlor having died, this child A, with one of the other children, now sued the administratrix of the settlor, to set aside the appointment to A as a fraud on the power, and for the settlor's estate to make good the amount of the policy. The Court of Appeal held that the appointment was a fraud on the power, and that the settlor's estate must make good the whole amount which would have been payable under the policy on the settlor's death. It

[1] *Henty* v. *Wrey*, 21 Ch. D., 332 ; 53 L. J., Ch., 667 ; 47 L. T., 231, in which case the whole subject is thoroughly discussed, and the case of *Hinchinbrook* v. *Seymour* is specially dealt with. See also notes to *Henty* v. *Wrey*, in Brett's Eq. Cas., 188.

was also, however, held that, having been a party to the fraud, A could not share in the sum recovered from the settlor's estate.[1]

Effect of an appointment being only partially fraudulent.

Aleyn v. *Belchier*.

Where there is a fraudulent appointment, or any arrangement of a fraudulent nature with regard to the property comprised in the power, it does not necessarily follow that the whole appointment is bad. Thus, where a husband had a power of appointment for the purpose of jointuring his wife, and he executed the power subject, however, to an agreement by the wife that she should only receive part as an annuity for her own benefit, and that the residue should be applied in payment of the husband's debts, this was held to be a fraud upon the power, and the appointment was set aside, except so far as related to the annuity.[2] Where the Court can see its way to sever the honest or legal part of an appointment from the dishonest or illegal part, then it will give effect to the legal part notwithstanding that it sets aside the other part.[3] If, however, the fraudulent part of the appointment affects the whole transaction, and the matter is incapable of being severed, then the whole appointment is bad.[4]

Releasing a power of appointment.

The Conveyancing Act 1881[5] expressly permits a person to whom any power is given, whether coupled with an interest or not, to release or contract not to exercise it; but this does not apply to a fiduciary power, that is, a power coupled with a trust,[6] and in respect of which there is a duty cast on the donee to exercise it. If, however, the power is

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[1] *Re Deane, Bridger* v. *Deane*, 42 Ch. D., 9; 61 L. T., 492; 37 W. R., 786.
[2] *Aleyn* v. *Belchier*, 2 Wh. & Tu., 308.
[3] Per Kekewich, J., in *Whelan* v. *Palmer*, 39 Ch. D., 648; 59 L. J., Ch., 784; 58 L. T., 937.
[4] 2 Wh. & Tu., 321, 322.
[5] 44 & 45 Vict., c. 41, sec. 52.
[6] *Saul* v. *Pattinson*, 55 L. J., Ch., 831; 34 W. R., 561.

not of such a nature, it is not a fraud to release it, even though the donee of the power thereby gets a benefit.[1] In a recent case, A had a life interest in certain property, with a power of appointment in favour of his only daughter, and her issue, in such shares as he thought fit, and in default of appointment the property was to go, on A's death, to the daughter absolutely. A executed a deed releasing the property from the power of appointment, to the intent that it should devolve in due course upon and become vested in his daughter at his death. Then some time afterwards he and the daughter created a mortgage on the property for £10,000, which was manifestly for his purposes, as he received the whole of the mortgage money, and covenanted to indemnify his daughter. It was held that the mortgage was perfectly valid.[2] Mr. Justice Chitty, in his judgment in this case, dealt with the point of whether it was a fraud as follows:—"It appears to me to be a fallacy to say that the doctrine is the same as in the case of an exercise of the power of appointment. There is no duty to exercise such a power, for although it is said, in a sense, that the donee of the power stands in a fiduciary position, yet the meaning of this is that the donee, if he should exercise the power, must exercise it honestly for the benefit of the objects of the power, and not corruptly for his own personal benefit. I see no reason for applying that doctrine where he does not exercise the power, but only releases the power. He may, or may not, be acting in his own interest. But that does not prevent him from saying that he will not exercise the power, and from releasing it." But where a person has a special power to appoint by will among his children, who are to take equally in default of

Re Somes.

[1] *Re Radcliffe, Radcliffe* v. *Bewes* (1892), 1 Ch., 227; 61 L. J., Ch., 186; 66 L. T., 363; *Smith* v. *Houhlon*, 26 Beav., 482.

[2] *Re Somes* (1896), 1 Ch., 250; 65 L. J., Ch., 262; 74 L. T., 49.

appointment, this is so far a fiduciary power that his contract or covenant to exercise it in a particular way is void and cannot be sued upon even if it is entered into by way of family arrangement or of ante-nuptial settlement.[1]

Excessive execution of power.

Alexander v. *Alexander*.

Where a person having a special power of appointment, openly appoints to persons who are not objects of the power, although there is nothing strictly fraudulent in this, yet it is equally bad, but this is styled the excessive execution of a power. Thus, under a power to appoint amongst children, the appointor appointed part to children, and part to grandchildren, and it was held that the part appointed to grandchildren was beyond the power, and bad.[2]

Illusory appointments.

An illusory appointment would formerly also have been a constructive fraud. An illusory appointment is when a person, having a power to appoint amongst a certain class, appoints to all the members of such class, but only gives a nominal share, or shares, to one or more members. Thus, A, having a power of appointment over £1,000, in favour of his children, and having three children, appoints £500 to one, £499 19s. to another, and 1s. to the remaining one. This last appointment is merely illusory—to use a common expression, literally true in this instance, the last child is "cut off with a shilling." To have appointed to the exclusion altogether of any child would have been bad, but if some share, however small, was appointed, then it was considered at Law as a valid exercise of the power. Still, this was not so in Equity, for here the Court of Chancery declined to follow the Common Law, and held that such an illusory appointment was not a *bonâ fide* exercise of

[1] *Re Bradshaw* (1902), 1 Ch., 436; 71 L. J., Ch., 230; 86 L. T., 253.
[2] *Alexander* v. *Alexander*, Tudor's Lead. C. Convyg., 395.

the special power, but was constructively fraudulent. Here then, the rules of Law and Equity clashed, but by the Illusory Appointments Act 1830 the Equity rule was abolished, and an illusory appointment was rendered valid in Equity as well as in Law. Still, even after this Statute, it was necessary to appoint some share to each of the objects of the power, though it might be a nominal or illusory share to one or more of them; but now, by the Powers Amendment Act 1874,[1] even an exclusive appointment is valid, that is to say, any member or members of the class may be omitted from the appointment, unless the instrument creating the power contains any declaration to the contrary. Of course, the doctrines of the Court with regard to fraudulent, excessive, illusory, or exclusive exercise of powers, have no application to cases of general powers, for as regards any power of that character, the donee of the power can deal with it as he chooses.

1 Wm. IV., c. 46.

37 & 38 Vict., c. 37.

Agreement not to bid at an auction.

It has been sometimes stated, that an agreement whereby parties engage not to bid against each other at a public auction, is bad as a constructive fraud, as it may operate to the injury of the vendor, and cause his property to be sold at an undervalue.[2] Although there may be circumstances under which, by reason of some direct fraud, or deceit, practised on the vendor by the parties, such an agreement might be held bad as a fraud, and by reason of which the vendor might claim to set the sale aside, yet it is submitted that there is nothing necessarily illegal, or fraudulent, in such an agreement, and that in the absence of any special circumstances it will stand. Thus, in one case, on an auction sale by order of the Court, X and Y agreed not to bid against each other, but that X should bid up to £1,500, and that if he

Re Carew.

[1] 37 & 38 Vict., c. 37.
[2] Story, 187.

purchased they should divide the estate between them. X bought at the auction at a low price, and the vendors, hearing of this agreement, sued to have the sale to X set aside. The Court refused to set it aside, the judge stating that he knew of no rule that a mere agreement between two persons, each desirous to buy a lot, that they would not bid against each other, was sufficient to invalidate a sale to one of them.[1]

30 & 31 Vict., c. 48.

By the Sale of Land by Auction Act 1867,[2] it is provided that no land shall be sold with a reserve, unless it is stated in the conditions that there is a reserve price, and that no puffer shall be employed by the vendor to bid, unless it is in like manner so stated that the vendor reserves his right. If, therefore, the vendor acts in infringement of this Statute, he is committing a virtual fraud on any purchaser; and if a person buys when the property is apparently sold without reserve, and without the employment of any one to bid for the vendor, and he then finds that there was a reserve, or that a person has been so employed, he has a right to have the sale set aside. This Act only applies to land, but a similar provision as to goods is contained in the Sale of Goods Act 1893.[3]

Cancellation and delivery up of instruments.

Where an instrument is void, or voidable, on the ground of fraud, or otherwise, or where, though not void, its object has been satisfied, and it forms a cloud over the plaintiff's rights, the Court will direct the same to be delivered up and cancelled; for it is against conscience for the party holding it to retain it, and especially is this so if it purports to convey property,

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[1] *Re Carew's Estate*, 26 Beav., 187; see also *Galton* v. *Emus*, 1 Collyer, 243; *Leopard* v. *Litoun*, 41 S. J., 545.
[2] 30 & 31 Vict., c. 48.
[3] 56 & 57 Vict., c. 71, sec. 58.

as its existence has a tendency to affect the plaintiff's position. Such jurisdiction is said to be exercised in favour of the plaintiff *quia timet*, that is, because he fears that the instrument sought to be delivered up may possibly be used to his detriment; but where the instrument is manifestly a nullity the Court will not interfere, because, in such a case, there is no occasion for it to do so.[1] Thus, the Court has refused to interfere, on behalf of a purchaser for value of lands by ordering delivery up of a prior voluntary settlement, the same being manifestly bad, against the plaintiff, under 27 Eliz., c. 4.[2] It will be borne in mind that now, however, a purchaser taking since the Voluntary Conveyances Act 1893,[3] would have no good title against the prior volunteer.

Jurisdiction exercised *quia timet*.

The principle of the Court giving assistance *quia timet* is widely applied, and is not by any means confined strictly to such cases as just mentioned, for the Court interferes on this principle in innumerable cases, to accomplish the ends of precautionary justice. A party seeks the aid of the Court because he fears some future probable injury to his rights or interests, and not because an injury has already occurred which requires compensation or other relief. The manner in which this aid is given is dependent upon circumstances, the Court sometimes interfering by the appointment of a receiver, and sometimes by directing security to be given, and sometimes by granting an injunction. As an example of relief given in the nature of *quia timet*, it may be mentioned that a surety has a right to take proceedings in Equity to compel the debtor

Wide application of *quia timet* principle.

Relief given to surety.

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[1] Story, 461-468.

[2] *De Hoghton* v. *Money*, L. R., 2 Ch., 164. See *ante*, p. 42.

[3] 56 & 57 Vict., c. 21. The Act came into operation 29th June, 1893. See *ante*, pp. 42, 43.

to pay the debt when due, whether the surety has been actually sued for it or not, for it is unreasonable that a man should always have a cloud hanging over him.[1]

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[1] *Wolmershausen* v. *Gullick* (1893), 2 Ch., 514; 62 L. J., Ch., 773; 68 L. T., 753.

CHAPTER VII.

OF SPECIFIC PERFORMANCE OF CONTRACTS, AND SPECIFIC DELIVERY UP OF CHATTELS.

Distinction between Law and Equity.

At Common Law every contract to sell or transfer a thing was, if no actual transfer had been made, treated as a mere personal contract, and if unperformed, the only remedy was an action for damages. But the Court of Chancery in many cases deemed such a remedy wholly inadequate for the purposes of justice, and did not hesitate, on the principle that "Equity acts *in personam*," to interpose, and require a strict performance of the contract, where it was possible to perform the same, enforcing obedience to its decree by attachment. This is the doctrine of specific performance of contracts.

The contract.

The first point manifestly to be looked to is, whether there is a binding contract existing between the parties. The ordinary essentials of every simple contract are: (1) Parties able to contract; (2) Their mutual assent to the contract; (3) A valuable consideration; and (4) Something to be done or omitted which forms the object of the contract.[1] In some cases also signed writing is required, by Statute, as the proper evidence of the contract. And although a deed does not require a valuable consideration to enforce it, so that there may be an action at law for damages for the breach of a covenant contained in a voluntary deed, yet with regard to seeking specific performance the rule is the same whether the contract is a simple contract or a deed, viz.: that the Court will not carry into effect a mere voluntary

Voluntary contracts even though under seal not enforced.

[1] Indermaur's Principles of Common Law, 33.

agreement, contract, or covenant, to transfer property or to do any act.[1] This seems only an extension in Equity of the Common Law rule *Ex nudo pacto non oritur actio*, for what the Court in effect says to any person who claims under a voluntary covenant is, "In so far as you have legal rights, enforce them at law; you might bring an action for damages, as upon a voluntary bond, but in so far as you seek from us a special equitable relief, something greater, and beyond what you can get at Common Law, we will not give you any assistance." Equity, in fact, though following the law, is not bound to give a purely equitable relief merely because a party has rights which would be recognised at law.

What will amount to a contract.

Most contracts of which specific performance is sought, are in writing, and it will generally be found that writing is essential by reason of the 4th section of the Statute of Frauds,[2] for the chief class of cases in which specific performance is desired is, as we shall presently see, the sale and purchase of land and houses. No formal contract is ever required, provided only that in some way the ordinary essentials appear, for what is required is evidentiary matter of the existence of a contract. Thus, a binding contract may be made out from letters passing between the parties, provided only that there is an offer on the one side, accepted unconditionally on the other, and that the Court can collect, from a fair interpretation of the letters, that they import a concluded contract, and this even although the parties evidently contemplated a more elaborate agreement being prepared. Thus, if A writes to B, offering to sell a house for £1,000, and B writes back simply accepting the offer, this is a binding

[1] *Ellison* v. *Ellison*, and Notes, 2 Wh. & Tu., 835. See also *ante*, pp. 37, 38.
[2] 29 Car. II., c. 3.

contract; but it would not be so if B, in accepting the offer, were to insert as a condition that half of the purchase-money should remain on mortgage. Where a person in definite terms accepts an offer, the mere fact that he says that his solicitor shall prepare and forward an agreement does not prevent there being already a concluded agreement to satisfy the Statute.[1] The tendency of modern decisions is, however, to apply greater strictness to the construction to be placed on a series of letters than was formerly done[2]; and, indeed, no memorandum which does not appear to be intended to amount to a concluded agreement can constitute a binding contract.[3] And even though there is an offer, and a direct acceptance, it sometimes happens that no contract is produced thereby, for evidence may be given of extraneous facts showing that the parties did not mean to be bound.[4]

The nature of the contract.

Assuming that there is a contract binding between the parties, it is important to consider its nature, for if it is of such a kind that damages for its breach will compensate both parties, then the Court will not decree specific performance.[5] Therefore, *as a general rule*, the Court will not specifically enforce performance of a contract for the sale of stock, or goods, because damages are manifestly a sufficient remedy, inasmuch as, with the damages, the party may ordinarily purchase the same quantity

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[1] *Rossiter* v. *Miller*, 3 App. Ca., 1124; 48 L. J., Ch., 10; *Fowle* v. *Freeman*, 6 Ves., 351. See also Brett's Eq. Cas., 334.

[2] *Nesham* v. *Selby*, L. R., 7 Ch., 406; 41 L. J., Ch., 551; *May* v. *Thomson*, 20 Ch. D., 705; 51 L. J., Ch., 917; 47 L. T., 295.

[3] *Winn* v. *Bull*, 7 Ch. D., 29; 47 L. J., Ch., 139; *Hawkesworth* v. *Chaffey*, 55 L. J., Ch., 335; 54 L. T., 72; *Watson* v. *McCallum*, 87 L. T., 547; *Botley* v. *Vidal*, 49 S. J., 635.

[4] *Hussey* v. *Horne-Payne*, 4 App. Ca., 311; 48 L. J., Ch., 846. See further Indermaur's Principles of Common Law, 35; Indermaur's Conveyancing, 276-278.

[5] *Adderley* v. *Dixon*, 1 Sim. & Stu., 607; *Harnet* v. *Yielding*, 2 Sch. & Lef., 553, 554. And see Story, 475, 476.

of the like stock, or goods.[1] Nor will the Court decree specific performance of a contract to borrow, or lend, money on mortgage, for damages will manifestly meet the case.[2] But with regard to contracts for the sale and purchase, or letting, of land or houses (though it is only a tenancy from year to year, or even less[3]) it is otherwise, for a person is taken to have a particular desire for the very land or house he has agreed to buy, or lease, and it cannot be said that damages will necessarily compensate him.[4] Therefore, although, as we shall presently see, there are cases in which the Court will decree specific performance of contracts relating to personal chattels, the great class of cases in which the Court grants this special relief, is that of contracts regarding land or houses.

South African Territories v. *Wallington.*

When the Court will decree specific performance of an oral contract relating to land.

The Court cannot, as a general rule, decree specific performance of a contract for the sale of land or houses, unless it is in writing and signed, as provided by the 4th section of the Statute of Frauds.[5] But to this rule there are four exceptions, viz. :—

(1) Where there has been a part performance of the oral contract.

(2) Where the contract was intended to be reduced into writing, but has been prevented from being so by the fraud of the defendant.

(3) Where, although the contract was oral, the plaintiff has set it out in his statement of claim, and

[1] *Cuddee* v. *Rutter*, 2 Wh. & Tu., 416.

[2] *Rogers* v. *Challis*, 27 Beav., 175; *South African Territories* v. *Wallington* (1898), A. C., 309; 67 L. J., Q. B., 470; 78 L. T., 426, which was an action for specific performance of a contract to lend money on the debentures of a company, and it was held that the only remedy was an action for damages.

[3] *Lever* v. *Koffler* (1901), 1 Ch., 543; 70 L. J., Ch., 395; 84 L. T., 584.

[4] *Buxton* v. *Lister*, 3 Atk., 384.

[5] 29 Car. II., c. 3. As to what will be a sufficient signature to satisfy the Statute where lands have been sold by auction, see *Potter* v. *Duffield*, L. R., 18 Eq., 4; 43 L. J., Ch., 472; *Rossiter* v. *Miller*, L. R., 3 App. Ca., 1124; 48 L. J., Ch., 10; *Stokell* v. *Niven*, 61 L. T., 18; *Filby* v. *Hounsell* (1896), 2 Ch., 737; 65 L. J., Ch., 852; 75 L. T., 270.

the defendant has admitted it in his statement of defence, and has not pleaded the Statute of Frauds.[1]

(4) Where the sale is by order of the Court, the judicial character of the proceedings makes it unnecessary for the contract to be signed by the vendor or his agent.[2]

Part performance.

The doctrine that the Court will in some cases grant specific performance of an oral contract relating to land or houses, notwithstanding the Statute of Frauds, is based on the principle that not to do so would be to open the door to fraud; and the Court will not allow a Statute to be made the implement of fraud. If A and B contract, though orally, and A suffers B to do certain acts partly performing the contract, surely it would be inequitable to allow A to then turn round and take advantage of the provisions of the Statute.[3] But it is not every act done by reason of the oral agreement which will be deemed a part performance; for acts to constitute part performance for this purpose, they must be such as are exclusively referable to the contract, done with no other view than to perform it, and of such a nature that it would be a fraud in the other party, after allowing them to be done, not to carry out the contract. Thus, if there is an oral contract that A shall build a house according to a certain plan, and that B shall then buy it for £500, it is not sufficient part performance for B to pay £25 as a deposit or for A to build the house, or for B to daily inspect the progress of the building; but if during the building B gives oral directions for alterations which A carries out, that entitles A to specific performance.[4] Again, the letting of a purchaser into

What acts sufficient part performance.

Dickinson v. *Barrow.*

[1] *Lester* v. *Foxcroft*, and Notes, 2 Wh. & Tu., 460.
[2] *Attorney General* v. *Day*, 1 Ves., sen., 221.
[3] Story, 499.
[4] *Dickinson* v. *Barrow* (1904), 2 Ch., 339; 72 L. J., Ch., 701; 91 L. T., 161.

Taking possession.

possession, if such giving of possession was exclusively referable to the agreement, is a sufficient part performance, particularly if the purchaser then expended money in building, or in repairs, or in improvements, for, under such circumstances, if the oral contract were to be treated as a nullity, he would be a trespasser.[1] But the mere continuing in possession by a tenant to whom the landlord has orally agreed to sell the premises, is not a sufficient part performance, for it cannot be said that his remaining in possession is exclusively referable to the agreement, unless there is something in addition, such as the laying out of money in repairs or improvements, upon the faith of the contract.[2] With regard, however, to an oral agreement for a new tenancy, to a tenant already in possession, though his continuing in possession is not sufficient part performance, yet if the new tenancy is to be at a higher rent than the old one, and the tenant pays a quarter's rent at the higher rate, that will constitute a sufficient part performance, and specific performance of the contract will be decreed.[3]

Nunn v. *Fabian.*

What acts not sufficient part performance.

None of the following acts will, in themselves, be a sufficient part performance to take a case out of the Statute of Frauds :—Part payment, or even payment of the whole, of the purchase-money ; delivery of an abstract ; making a valuation of timber on the estate, which is to be paid for at a valuation ; preparing the draft conveyance. All such acts are only ancillary to the transaction, and the party can be placed in *statu quo*.[4] And marriage is not in itself, unaccompanied by other acts, such as

Marriage.

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[1] Story, 502.
[2] 2 Wh. & Tu., 467.
[3] *Nunn* v. *Fabian*, L. R., 1 Ch. Apps., 35 ; 35 L. J., Ch., 140 *Miller & Aldworth, Ltd.* v. *Sharp* (1899), 1 Ch., 622 ; 68 L. J., Ch., 322 ; 80 L. T., 77.
[4] 2 Wh. & Tu., 465.

giving possession of the property, a sufficient part performance. The reason for this is that although the parties cannot be placed in *statu quo* (so that, in a sense, it is suffering a fraud to be committed to allow the party to refuse to perform his contract), yet to hold that marriage is a sufficient part performance would be to act in direct opposition to another clause in the 4th section of the Statute of Frauds, which provides that no action shall be brought upon a contract made in consideration of marriage, unless such contract is in writing and signed by the party to be charged therewith.[1] But although this is so, yet, where a person marries upon the faith of a representation made to him, or her, for the purpose of influencing his or her conduct with reference to the marriage, then, provided such representation is clear and absolute, the person making the same will be compelled in Equity to make it good. Where, however, the representation is merely of what a person intends to do, or where it is of such a character as not in any way to amount to a contract, but simply to give the party to whom it is made to understand that he must rely on, or trust to, the honour of the other, the Court cannot enforce the performance of the representation or promise. Indeed, it may be stated that no representation will be enforced which only amounts to a promise to do something *in futuro*, but that it must be a representation of some state of facts alleged to be at the time actually in existence.[2] As a simple instance of a representation, not resting merely in promise, but being of existing facts, and which would undoubtedly be enforced, we may take the following:—A father, in order to induce a man to marry his daughter, represents to him that he has

As to representations made on marriage.

Representation of existing fact.

[1] *Lassence* v. *Tierney*, 1 Mac. & G., 551; *Surcombe* v. *Pinniger*, 3 De G., M. & G., 571.
Maddison v. *Alderson*, 8 App. Ca., 473; 52 L. J., Q. B., 737.

actually executed a certain settlement of property upon his daughter and the intended husband; here, the representation would have to be made good, for this is a representation as to an existing fact, and not a mere promise of what shall be done.

Loffus v. *Mawe* contrasted with *Maddison* v. *Alderson*.

On this subject it may be well to refer to two cases in particular, viz., *Loffus* v. *Mawe*,[1] and *Maddison* v. *Alderson*,[2] both of which are capable of being reconciled, although some of the principles of the decision in the first-mentioned case were hardly approved in the latter. In *Loffus* v. *Mawe*, a testator induced the plaintiff to become his housekeeper, on the strength of a verbal representation that he had left her certain property by his will, and the Court, after his death, compelled this representation to be made good. Now here, it will be noticed, was a representation of an existing state of things, and there was not merely a promise to make a will in the party's favour. In *Maddison* v. *Alderson*, a testator induced a lady to continue as his housekeeper by a verbal promise to make a will of certain houses in her favour, which he did not do, and the Court refused to enforce the promise. Here, there was no representation of any existing state of things, but merely a promise.

Whether the doctrine of part performance applies to contract relating to property other than land.

McManus v. *Cooke*.

It has been laid down that the doctrine of part performance, whereby a contract not enforceable at Law owing to the provisions of the Statute of Frauds is rendered enforceable in Equity, is confined to cases of contracts relating to land, and interests in land.[3] But in a modern case this statement of the law was dissented from, and Mr. Justice Kay, after a full consideration of the authorities,

[1] 3 Giff., 592.
[2] 8 App. Ca., 473; 52 L. J., Q. B., 737.
[3] *Britain* v. *Rossiter*, 11 Q. B. D., 123; 48 L. J., Eq., 362; 40 L. T., 240.

submitted that there may be cases other than contracts relating to land in which the Court will apply the doctrine. He stated that the authorities on the subject seemed to him to establish the following propositions:—

1. The doctrine of part performance of a parol agreement which enables proof of it to be given, notwithstanding the Statute of Frauds, though principally applied in the case of contracts for sale or purchase, or for the acquisition, of an interest in land, has not been confined to those cases.

2. Probably it would be more accurate to say, it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing.

3. The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement.

4. The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the Statute.

5. But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement, which, if in writing, would be such as the Court would direct to be specifically performed.

6. The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.[1]

Writing prevented by fraud.

As regards the second mentioned case in which the Court will decree specific performance of a contract, although not in writing as required by law, viz., where it was prevented from being reduced into writing by the fraud of the other party, the principle of this

[1] *McManus* v. *Cooke*, 35 Ch. D., 681; 56 L. J., Ch., 662 56 L. T., 900. See Story, 503, 504.

exception is, that were the Court not to do so, the Statute, which was designed to suppress fraud, would be the greatest assistance to fraud. Thus, if an agreement required by law to be reduced into writing, should be arranged between the parties, and entrusted to one of them to be embodied in writing, and this party fraudulently changes it for a different agreement, which is executed, in this, and like cases, the Court will relieve by enforcing the real arrangement come to, and for which the agreement that was executed was fraudulently substituted.[1]

Oral contract admitted in pleadings.

As regards the third mentioned case in which the Court decrees specific performance of a contract, although not in writing as required by law to be, viz., admission in the pleadings, the reasons for this exception are, that the Statute is designed to guard against fraud and perjury, and, the contract being now admitted, there can be no danger of anything of that sort, and in substance, though late in the day, now, by means of the pleadings, the contract is at last substantially in writing. But, if the defendant pleads the Statute, this has no application, for he is entitled to take advantage of it, and if he does not plead the Statute, he may indeed be fairly deemed to have waived it, for the rule is, *Quisque renuntiare potest jure pro se introducto*.[2]

Distinction between position of plaintiff seeking, and defendant resisting, specific performance.

In some cases, although there may be a contract in writing, yet there may subsequently have been some oral variation of it, and it is necessary to consider the effect of such an oral variation. A person cannot add to a written contract oral stipulations which were agreed to at the time, but which were not reduced into writing.[3] Yet it is

[1] Story, 508, 509.
[2] *Ibid.*, 498.
[3] See Indermaur's Principles of Common Law, 29.

always open to a person, against whom specific performance is sought, to show, as a defence, not only that by fraud, accident, or mistake the thing bought is different from what he intended, but also that the terms of the written contract were afterwards varied by word of mouth; for the Statute of Frauds does not say that the written contract shall bind, but simply that the unwritten contract shall not bind. But, as a general rule, though a subsequent oral variation may be taken advantage of as a defence, it is not open to a person to obtain specific performance of a written contract as subsequently varied by oral stipulations between the parties.[1] This distinction is well shown by the following example:—A sues B for specific performance of a written contract; B sets up in his statement of defence that there was a subsequent oral variation, and then, by way of counter-claim, he asks for specific performance of the written contract with such oral variation. The defence would be good, and would prevail, but the counter-claim would be bad, and would be dismissed.[2]

Woollam v. *Hearne.*

Townshend v. *Stangroom.*

In the same way, however, that we have seen that the Court will in some cases decree specific performance of an oral contract required by law to be in writing, so also in some practically analogous cases the Court will decree specific performance of a written contract as subsequently varied by oral terms or stipulations, viz.:—

Three cases in which Court will decree specific performance with oral variation.

(1) After there have been acts of part performance of the subsequent oral variation, of the nature before described as regards the principal contract;

(2) Where the defendant in his defence sets up an oral variation of the contract as a reason for its non-performance, and the plaintiff then amends his claim,

[1] *Woollam* v. *Hearne*, 2 Wh. & Tu., 513.
[2] *Townshend* v. *Stangroom*, 6 Ves., 328; Story, 509, 510.

and seeks specific performance with the oral variation; and

(3) Where the oral variation has not been reduced into writing by reason of the fraud of the defendant.[1]

Contracts relating to personal chattels.

Although land or houses are generally the subject matter of those contracts of which the Court decrees specific performance, yet, in certain cases, the Court will also interfere in like manner, although personal chattels form the subject of the contract, mainly upon the ground that, on account of the peculiar nature of the case, damages would not be a sufficient or satisfactory remedy, and the following cases may be particularly enumerated:—

1. Special value.

1. Where the chattel is of special and peculiar value, such as an article of *vertu*, a picture, or the like. Thus, in one case the Court decreed specific performance of a contract for the sale of two china jars, which were so nearly unique that it was impossible to say what price they would fetch in the market.[2]

2. Peculiar nature.

2. Where there is some special element connected with the contract which it is practically impossible, or at any rate very difficult, to compensate for by damages, *e.g.*, a contract to sell a debt owing in a person's bankruptcy, for it is quite uncertain what the dividends will be.[3] So also, where there was a contract for the sale of 800 tons of iron, to be delivered and paid for in a number of years, by instalments, according to the then market price of iron, specific performance was decreed, for the profit upon the contract depended on future events, and could not be estimated except by conjecture.[4] And upon much the same principle the Court will decree specific performance of a contract for the sale of a patent.[5]

[1] *Woollam* v. *Hearne*, and Notes, 2 Wh. & Tu., 513.
[2] *Falcke* v. *Gray*, 5 Jur., N. S., 645.
[3] *Adderley* v. *Dixon*, 1 S. & S., 607.
[4] *Taylor* v. *Neville*, 3 Atk., 384; *Buxton* v. *Lister*, 3 Atk., 385.
[5] *Cogent* v. *Gibson*, 33 Beav., 557.

3. Where the contract is for the sale of shares in a company as distinguished from the public funds, upon the principle that, unlike the public funds, which can always be obtained by a person who chooses to apply on the market for them, the shares of companies are limited in number, and are not always to be had in the market.[1] The purchaser of such shares may have had a particular reason for desiring to be a shareholder in the company, and he may be prevented from being so, but the same argument cannot be applied to ordinary stock. It is submitted that, at the present time, specific performance would not be decreed if it is proved that the same kind of shares can be bought without difficulty in the market. 3. Shares.

4. Where, beyond a contract, a trust is created between the parties in respect of the chattels, *e.g.*, if A by marriage articles agrees to hand over certain chattels to trustees, in trust for realization and investment by them, and after the marriage he refuses to do so. The Court would here compel the specific performance by A, of what he had contracted to do.[2] 4. Trust.

As connected with this subject, it may here be noticed that the Sale of Goods Act 1893[3] now provides that, in any action for breach of contract to deliver specific goods sold, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. Such judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment Provision of Sale of Goods Act 1893.

[1] *Duncuft* v. *Albrecht*, 12 Sim., 189.
[2] *Pooley* v. *Budd*, 14 Beav., 34, 43.
[3] 56 & 57 Vict., c. 71, sec. 52. This enactment is in substitution for the former provision contained in the Mercantile Law Amendment Act 1856 (19 & 20 Vict., c. 97, sec. 2), which provision is now repealed.

of the price, and otherwise as the Court deems just, and the application by the plaintiff may be made at any time before judgment or decree.[1] This is, however, a purely discretionary power, whereas in cases in which specific performance is sought on the principles on which the Court of Equity has always acted, the party has practically a right to specific performance, assuming there is no special reason which renders it inequitable to grant it.

The remedy must be mutual.

In all cases in which specific performance is sought, the remedy, if it exists at all, must be a mutual one, so that, if looked at in the light of the interest of one of the parties to a contract, it is of such a nature that the Court would grant specific performance, so also will the Court do so at the instance of the other, although the relief sought by him is merely in the nature of compensation in damages or value.[2] Thus damages will, naturally, compensate a vendor of land where his purchaser does not complete, but damages may not compensate the purchaser if his vendor does not complete. Therefore, as the purchaser could get specific performance, the Court, on the principle of mutuality of remedy, gives specific performance also at the instance of the vendor. Of course, in reality, a vendor's action for specific performance assumes the nature of an action for the price of the property.

Infant cannot get specific performance.

Upon the same principle, of want of mutuality, the Court will not decree specific performance of a contract in favour of an infant, because it cannot enforce specific performance against him[3]; for though it is true that infancy is, at law, a personal privilege, and an infant

[1] See also *post*, pp. 307, 308, as to specific delivery of chattels wrongly detained.

[2] Story, 480.

[3] *Vansittart* v. *Vansittart*, 4 K. & J., 62; *Flight* v. *Bolland*, 4 Russ., 298.

may sue at Common Law, though not capable of being sued, yet, as regards specific performance, that is a remedy beyond the powers of Common Law, and the Court of Equity has practically always said, that such a remedy shall not be given by them where it would be unfair or inequitable to give it. So if two joint tenants agree to grant a lease, and one is an infant, specific performance cannot be decreed against the infant, nor will it be given against the adult as to his share (unless he has been guilty of misconduct or misrepresentation) for the contract purported to deal with the entirety.[1] But where a contract required by the Statute of Frauds to be in writing, is signed by only one party, the person who has signed may be sued for specific performance, although it is evident that he could not himself sue for specific performance, for as regards the other party the requirements of the Statute have not been complied with. This is apparently an exception to the ordinary rule requiring mutuality, but when closely examined, it is not really an exception. The Statute of Frauds only requires the agreement to be signed by the party to be charged[2]; and when the other party sues, he must submit to perform his part of the contract, and so affirms his liability under it, and makes the remedy mutual.[3]

Contract signed by one party only.

The Court will refuse to give specific performance where the consideration, or nature, or scope, of the contract is illegal or immoral; or where it is against public policy, such as a contract by an officer in the army or navy with reference to his *future* accruing pay; or where alienation is prohibited by Statute, as

Defences to actions for specific performance.

[1] *Lumley* v. *Ravenscroft* (1895), 1 Q. B., 683; 64 L. J., Q. B., 441; 72 L. T., 382.
[2] *Reuss* v. *Picksley*, L. R., 1 Ex., 342; 35 L. J., Ex., 218.
[3] *Fowle* v. *Freeman*, 9 Vis., 350; *Western* v. *Russell*, 3 V. & B., 192; *Flight* v. *Bolland*, 4 Russ., 301.

in some cases of pensions even for past services[1]; or where the contract is one dealing with a mere naked right to litigate, *e.g.*, a right to set aside a conveyance for fraud; or where the contract is one to refer matters to arbitration instead of resorting to the Court, for it is deemed against public policy to exclude any person from the appropriate judicial tribunal.[2] The Court also will not, as we have seen, interfere where the defendant can show that by fraud, accident, or mistake the thing bought is different from what he intended, or that material terms have been omitted in the written agreement, or that there has been a variation of it by parol, or that there has been a parol discharge of the written contract.[3] And a covenant by a lessor of residential flats to employ a porter who shall perform certain specified services for the tenants will not be specifically enforced, as it is an indivisible contract, and it would require the constant superintendence of the Court.[4]

Contracts involving personal skill, or to do personal acts.

The Court will not grant specific performance in cases where it is practically impossible to compel the doing of the thing contracted to be done, and this in particular involves the point of contracts for the doing of personal acts. Thus, it is evident, that in all cases of contracts to do acts involving the personal skill of the party, the Court cannot compel the person to put forth that skill if he will not. If an artist agrees to paint a picture, and will not do so, it may be that damages will not compensate, but how can the Court compel him to put forth his

[1] *Lucas* v. *Harris*, 18 Q. B. D., 127; 50 L. J., Q. B., 15; 55 L. T., 658.

[2] With regard, however, to arbitration, though the Court will not decree specific performance of a contract to refer, a binding submission to arbitration may be made under the Arbitration Act 1889 (52 & 53 Vict., c. 49). This Statute, generally, contains the entire law of arbitration. See Indermaur's Practice, Part V.

[3] Story, 510; *ante*, p. 289.

[4] *Ryan* v. *Mutual Tontine Association* (1893), 1 Ch., 116; 62 L. J., Ch., 252; 67 L. T., 820.

artistic skill? Or if a singer agrees to sing, or an actor to act, how can the Court compel such personal acts?[1] The utmost relief that the Court can give in such cases is, that where the party who has agreed to do the particular personal act has stipulated that he will not do a like thing for any other person during a certain period, *e.g.*, in the case of a singer agreeing not to sing, or an actor agreeing not to act, during a certain period, at any other place of entertainment, the Court will grant an injunction against the infringement of this negative stipulation.[2] There must, however, be an express negative stipulation, so that where the defendant agreed to become manager of the plaintiff company's works for a certain period, and during that period to give the whole of his time to the company's business, but there was no express stipulation not in any way to act contrary to this agreement, the Court refused to grant an injunction to restrain the defendant from becoming a director of a rival company.[3] There are many cases in which, there being an express negative stipulation, an injunction in the nature of specific performance is decreed, *e.g.*, covenants not to remove manure at the end of a lease; covenants not to plough up meadow land; covenants not to dig gravel, sand, or coal.[4] Where a contract for the sale of chattels contained an express stipulation not to sell to any other manufacturer, the Court granted an injunction to restrain the breach of the negative stipulation, and thus, practically, compelled specific performance, although the contract was one of which specific performance

Injunction granted when a negative stipulation.

Whitwood Chemical Co. v. *Hardman.*

Injunctions in the nature of specific performance.

Donnell v. *Bennett.*

[1] See *Lumley* v. *Wagner*, 1 De G., M. & G., 604.

[2] *Lumley* v. *Wagner*, *supra*.

[3] *Whitwood Chemical Co.* v. *Hardman* (1891), 2 Ch., 416; 60 L. J., Ch., 428; 64 L. T., 716. And even though there be a negative stipulation, yet if it is only negative in form, and is affirmative in substance, the Court will not grant an injunction (*Davis* v. *Forman* (1894), 3 Ch., 654; 43 W. R., 168). See also *post*, pp. 468, 469.

[4] Story, 481.

would not have been decreed in direct terms.[1] Also if a contract (other than for personal service) is affirmative in form but negative in substance, an injunction can be obtained to prevent a breach, *e.g.*, if A contracts to take all the electric energy required for his premises from B for five years.[2]

Wolverhampton Electric Supply Co. v. *Ginder.*

Contracts to build or repair.

The Court will not decree specific performance of a contract to repair premises, considering that damages will compensate, and also that there is an element of uncertainty about the matter, rendering it difficult for the Court to see that the actual contract is carried out. Nor for the same reasons will the Court, as a general rule, decree specific performance of a contract to build, or to rebuild, premises; but it is now settled that the Court will do so, where the work to be done is clearly defined and the plaintiff has a substantial interest in its execution which cannot be compensated for by damages, and the defendant has, by the contract, obtained from the plaintiff possession of the land on which the work is to be done.[3]

Wolverhampton Corporation v. *Emmons.*

Contract or sale of goodwill.

The Court will not decree specific performance of a contract to sell the goodwill of a business unconnected with the premises where the business is carried on; but where the goodwill is altogether, or principally, annexed to the premises, a contract for the sale of the goodwill and premises together will be enforced, the goodwill, which is part of the sale, being nothing more than the probability that the old customers will resort to the same place.[4] It seems

[1] *Donnell* v. *Bennett*, 22 Ch. D., 835; 52 L. J., Ch., 414; 48 L. T., 68.

[2] *Metropolitan Electric Supply Co.* v. *Ginder* (1901), 2 Ch., 799; 70 L. J., Ch., 862; 84 L. T., 818; *Wolverhampton Railway* v. *L. & N. W. Railway*, 43 L. J., Ch., 131, 133; *Catt* v. *Tourle*, 38 L. J., Ch., 665.

[3] *Wolverhampton Corporation* v. *Emmons* (1901), 1 Q. B., 515; 70 L. J., K. B., 429; *Molyneux* v. *Richard* (1906), 1 Ch., 34; 75 L. J., Ch., 39 93 L. T., 698.

[4] 2 Wh. & Tu., 441; Fry on Specific Performance, 39.

doubtful whether the Court will decree specific performance of a contract for the sale of a medical practice to a duly qualified medical man, even though the premises where the practice is carried on are included[1]; and the same doubt applies to a contract for the sale of a solicitor's business to another solicitor, though such a contract is in itself perfectly valid.[2]

Decreeing specific performance notwithstanding terms of contract not strictly observed.

If the contract is one of such a nature that the Court would ordinarily decree specific performance of it, then, notwithstanding that certain of its terms have not been complied with, yet if such terms do not pertain to the essence of the contract, or if there has been a slight misdescription of the property, the Court will decree specific performance, even in favour of the party chargeable with the non-compliance or misdescription, if compensation can be made for any injury occasioned to the other party.[3] The most important point to be considered in connection with this rule is, that of the vendor not having the same interest in the estate as he has contracted to sell.

When the Court will decree specific performance with compensation.

Where there is an agreement to sell property, and the vendor knows at the time that he has not got in every respect what he contracts to sell, then, upon the commonest principles relating to fraud, the Court will not decree specific performance at his instance. And where, though the vendor was ignorant of his want of title, the failure to perform the contract is substantial, so that in fact it would appear that if there had been no misdescription the person would not have agreed to purchase, then equally the Court will not decree specific performance against

[1] *May* v. *Thompson*, 20 Ch. D., 705; 51 L. J., Ch., 917; 47 L. T., 295.
[2] *Whittaker* v. *Howe*, 3 Beav., 383.
[3] Story, 514, 515.

the purchaser. But where the misdescription is unknown to the vendor, and the purchaser can get substantially what he contracted for, then the Court will decree specific performance even at the vendor's instance, giving compensation to the purchaser for the misdescription, in the shape of an abatement of the purchase-money.[1] Thus, where the vendor, who did not know of any defect in his title, could not make a good title to a small portion of the estate, not material to the enjoyment of the whole, the Court decreed specific performance with compensation[2]; and where fourteen acres of land were sold as water meadow, and only twelve acres answered that description, the Court decreed specific performance with compensation.[3]

Contract for sale of premises with some adjunct.

Where there is a definite agreement to sell premises, together with something else which forms, as it were, an adjunct to such premises, but which is not an essential part of them, and a performance of the contract as regards the adjunct becomes impossible, yet the Court will decree specific performance of the contract without such adjunct.

Richardson v. *Smith.*

Thus, where there was an agreement for the sale of an estate for £24,000, and the agreement provided that certain furniture and other articles on the estate (which were worth about £2,000) should be taken by the purchaser at a valuation to be made by valuers to be mutually agreed on, and the vendor refused to appoint a valuer and to complete, the Court decreed specific performance of the contract, except so far as related to the furniture and other articles.[4] But if the adjunct is essential to the enjoyment of the property, *e.g.*, in the case of trade fixtures in a public-house, specific performance of

[1] 2 Wh. & Tu., 501.
[2] *McQueen* v. *Farquhar*, 11 Ves., 467.
Scott v. *Hanson*, 1 R. & My., 128.
[4] *Richardson* v. *Smith*, L. R., 5 Ch. Apps., 648; 39 L. J., Ch., 877.

the contract to purchase the property without the adjunct will not be enforced.[1]

Contract to sell land of one tenure, which is in fact of another.

Where property is agreed to be sold as of one tenure, and it turns out to be of another, this is not a matter for compensation, and specific performance will not be decreed.[2] In the case, however, of long leasehold property, capable under the Conveyancing Acts 1881 and 1882[3] of being converted into a fee simple, the fact that it was described as freehold when it was in fact leasehold would appear to be immaterial, as the vendor can at once make it freehold.

Purchaser's right to specific performance notwithstanding misdescription.

Burrow v. *Scammell.*

Although a person cannot, as before stated, be compelled to take a portion of the property agreed to be sold to him, where the portion to which a title cannot be made is material to the enjoyment of the whole, yet a purchaser may, in general, if he wishes to do so, elect to take what he can get, with compensation. So that where the defendant agreed to let premises to the plaintiff, and it turned out that he was only entitled to half such premises, it was held that the plaintiff was entitled to specific performance in respect of the half, with an abatement of half the rent.[4] This, therefore, forms an exception to the ordinary rule, that there must be mutuality of remedy. But this principle does not apply where the purchaser, at the time of entering into the contract, knew of the vendor's limited, or defective, title, for to grant specific performance in this case might be to inflict a hardship on the vendor.[5]

[1] *Darby* v. *Whittaker*, 4 Drew, 134.
[2] 2 Wh. & Tu., 502.
[3] 44 & 45 Vict., c. 41, sec. 65; 45 & 46 Vict., c. 39, sec. 11.
[4] *Burrow* v. *Scammell*, 19 Ch. D., 175; 51 L. J., Ch., 296; 45 L. T., 606. Specific performance will be decreed against a co-owner of a contract to sell or lease his moiety, *Ibid.*; *Hexter* v. *Pearce* (1900), 1 Ch. D., 41; 69 L. J., Ch., 146; 82 L. T., 149.
[5] *Castle* v. *Wilkinson*, L. R., 5 Ch. Apps., 534; 39 L. J., Ch., 843; *Rudd* v. *Lascelles* (1900), 1 Ch., 815; 69 L. J., Ch., 396.

As to time being of the essence of the contract.

On the principle, before mentioned, that specific performance may be decreed notwithstanding certain terms have not been strictly complied with, a contract may be decreed to be specifically carried out, although stipulations as to time have not been observed, any proper compensation being made for the non-observance of the stipulations.[1] At Law the rule was different, for there stipulations as to time were always considered of the essence of the contract. In Equity it was never so, unless it was originally expressly so stipulated; or unless it had, after default, been made so by a reasonable notice by the other party to that effect; or unless it appeared to be the intention of the parties that it should be so from the nature of the property, *e.g.*, a public-house, or other business, sold as a going concern, for such property is necessarily of a fluctuating character[2]; or an annuity which may determine at any moment; or a reversion which may, of course, suddenly change into an estate in possession.[3] Now, by Section 25 of the Judicature Act 1873, stipulations in contracts, as to time and otherwise, which were not of the essence of the contract in Equity, are to receive this equitable construction in all Courts.[4] However, this rule of Equity did not apply to mercantile contracts, and in these contracts stipulations as to time are still of the essence of the contract.[5] And the Sale of Goods Act 1893 provides that in contracts for sale of goods unless a different intention appears from the terms of the contract, stipulations as to time of payment are not to be deemed of the essence of the contract; and that whether any other stipulation as to time is of the essence of such a contract, or not, depends on the terms of the contract.[6]

Mercantile contracts.

[1] *Seton* v. *Slade*, 2 Wh. & Tu., 475.
[2] *Smith* v. *Batsford*, 76 L. T., 179.
[3] *Story*, 514-516; 2 Wh. & Tu., 494-500; *Tilley* v. *Thomas*, L. R., 3 Ch., 61; Brett's Eq. Cas., 368.
[4] 36 & 37 Vict., c. 66, sec. 25 (7).
[5] *Reuter* v. *Sala*, 4 C. P. D., 249; 48 L. J., Q. B., 492.
[6] 56 & 57 Vict., c. 71, sec. 10.

No specific performance when it would be wrong or inequitable to decree it.

It may be stated generally that the Court will not interfere to decree specific performance, except in cases in which it would be strictly equitable to do so. If to grant specific performance would be to work a hardship on the other party, the Court will not interfere in this manner, but will leave the party to whatever legal right he may have in an action for damages, or the Court may itself grant damages, as will be presently explained. Thus, where a purchaser of the fee simple covenanted not to use the land in a certain way, with a view to the more ample enjoyment of the adjoining land by the vendor, and afterwards by the voluntary acts of the vendor and grantees from him, the character and condition of the adjoining land had been so greatly altered that the contemplated benefits had disappeared, the Court refused to enforce the restrictive covenants against the purchaser, and left the party to sue at law for damages on the covenant.[1] And in a more recent case, an estate had been sold in building lots, and the purchaser of each lot had covenanted with the vendor, and with the other purchasers, not to carry on any trade, and after some years the owner of one lot broke this covenant, and was sued by the owner of another lot for an injunction and damages, which meant practically specific performance of the covenant. It was proved that the character of the estate as a residential property had completely changed, and this change of circumstances was beyond the control and independent of any acts of the plaintiff; but it was held that the action failed because the plaintiff had been guilty of acquiescence in the breach—he had actually dealt at the shop for nearly a year before bringing his action—which barred him from

Bedford v. *British Museum.*

Sayers v. *Collyer.*

[1] *Duke of Bedford* v. *British Museum Trustees*, 2 Myl. & K., 552. See also *Peek* v. *Matthews*, L. R., 3 Eq., 515; *German* v. *Chapman*, 7 Ch. D., 271; 47 L. J., Ch., 250.

Hope v. *Walter*.

enforcing the covenant either by way of injunction or of damages.[1] Again, where a vendor sued for specific performance of a contract for sale and purchase of a house, it appeared that the purchaser had, after entering into the contract, discovered that the house was being used by the tenant as a brothel, of which fact the vendor was not himself aware at the time of the contract; and it was held that this was sufficient ground for refusing specific performance, for the purchaser might find himself exposed to the hardship of a criminal prosecution.[2] Yet it will be observed that here there was a good contract, for there was neither fraud nor misrepresentation, and an action could apparently have been maintained for damages. It would be well, indeed, to remember that the remedy given in Equity of enforcing the specific performance of contracts, is not a matter of absolute right in either party, but of discretion in the Court; not indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as may be, by general rules and principles, but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.[3] Thus, laches may prevent a person obtaining specific performance, although he may not be statute barred, for in asking for specific performance he is seeking a special equitable relief, and the rule of the Court is, *Vigilantibus non dormientibus æquitas subvenit*.[4]

Specific performance a discretionary remedy.

Laches.

[1] *Sayers* v. *Collyer*, 28 Ch. D., 103; 54 L. J., Ch., 1; 51 L. T., 723. Compare *Knight* v. *Simmonds* (1896), 2 Ch., 294; 65 L. J., Ch., 583; 74 L. T., 563, in which an injunction was granted, as plaintiff had neither acquiesced nor altered the character of the estate.

[2] *Hope* v. *Walter* (1900), 1 Ch., 257; 69 L. J., Ch., 166; 82 L. T., 30.

[3] Story, 489, 490. See also *Re Hare & O'More's Contract* (1901), 1 Ch., 93; 70 L. J., Ch., 45; 83 L. T., 672.

[4] See *ante*, pp. 23-25.

Thus a delay of a year after defendant had refused to perform the contract has been held to bar relief.[1]

Specific performance not enforced after a voluntary settlement.

Before the Voluntary Conveyances Act 1893,[2] it was held that where a person had made a voluntary settlement of land, and had afterwards agreed to sell it, the Court would not, at his instance, decree specific performance against the purchaser, notwithstanding that by reason of the provisions of 27 Eliz., c. 4, the sale and purchase would, if completed, avoid the voluntary settlement, and the purchaser would gain a good title.[3] But it would grant specific performance at the instance of the purchaser,[4] who was entitled to take what he could get, and might require the vendor to complete his contract to convey, even though he had no actual estate. It will be borne in mind that now, under the Voluntary Conveyances Act 1893, a subsequent sale does not avoid a prior voluntary settlement of the land, so that a person having made a voluntary settlement cannot afterwards give a good title to a purchaser by conveying to him.[5]

Granting damages.

It is evident, on the principle of specific performance being a discretionary remedy, that in many cases, though a person may fail in obtaining specific performance, yet he may have a good claim for damages. It seems doubtful whether the Court of Chancery originally had jurisdiction to award damages instead of, or incidental to, the relief it gave by specific performance.[6] By Lord Cairns' Act,[7] it was, however, provided generally, that in all cases in which the Court of Chancery then had jurisdiction to entertain an action for specific

[1] *Watson* v. *Reid*, 1 R. & M., 236. [2] 56 & 57 Vict., c. 21.
[3] *Smith* v. *Garland*, 2 Mer., 123; *ante*, p. 42.
[4] *Daking* v. *Whimper*, 26 Beav., 568.
[5] See *ante*, p. 43.
[6] Story, 496. [7] 21 & 22 Vict., c. 27, sec. 2.

performance, it should be lawful to award damages, either in addition to, or in substitution for, specific performance. The Judicature Act 1873[1] also provides that the Supreme Court shall grant all such remedies whatsoever as any of the parties to an action appear to be entitled to in respect of any legal or equitable claim. It may be noticed that Lord Cairns' Act was repealed by the Statute Law Revision Act 1883[2]; but its effect is kept alive by a general provision of the repealing Act,[3] so that, for all practical purposes, it is still an existing Statute.[4] The joint effect of the two statutory provisions on the subject is, that damages may now be given instead of, or in addition to, specific performance, and even though specific performance could not, on the principles adopted by the Court, be properly granted. In other words, the plaintiff may now come to the Court and say: "I claim specific performance, but if you think I am not entitled to specific performance of the whole, or any part, of the agreement, then I claim damages."[5]

Specific performance of contract relating to land abroad.

To entitle the Court to grant specific performance of a contract relating to land, it is not actually necessary that the land should be situate in this country. It is sufficient that the parties to be affected, and bound by the judgment, are resident here, for in all suits in Equity the primary judgment is *in personam* and not *in rem*, and the incapacity to enforce the judgment *in rem* constitutes no objection to the right to entertain such a suit.[6] But the Court can only act *in personam;* so that where the lands are out of the jurisdiction, then, even although they may be in one of our colonies,

[1] 36 & 37 Vict., c. 66, sec. 24.
[2] 46 & 47 Vict., c. 49.
[3] Sec. 5.
[4] *Sayers* v. *Collyer*, 28 Ch. D., 103; 54 L. J., Ch., 1; 51 L. T., 723.
[5] *Elmore* v. *Pirrie*, 57 L. T., 333. See 2 Wh. & Tu., 448-453.
[6] Story, 490; *Penn* v. *Lord Baltimore*, 1 Wh. & Tu., 755; *ante*, pp. 22, 23.

the Court cannot affect them directly, or in any way other than by proceedings *in personam*, and will refuse to make any order for the delivery up of possession thereof.[1]

Where specific performance sought, but vendor has no title.

If there is an agreement to buy and to sell land, or other property, and the vendor turns out to have no good title to it, it is manifest that it is impossible for the Court to decree specific performance. And where the vendor is the plaintiff and fails to make out a title, the Court will dismiss his action with costs, and order the return of any deposit and interest, and, if required, the Court will also make the same a lien on whatever interest the plaintiff has in the estate.[2] As a general rule, the Court will not admit as a defence to an action for specific performance that the title is a doubtful one, but will itself determine whether the title is good or bad,[3] unless, indeed, it is some matter of great difficulty, and there are parties not before the Court whose interests may be affected, or the doubt is not one on some general rule of law, but turns on the construction of some badly worded instrument as to which the Court itself is doubtful.[4]

Doubtful title.

Summons under Vendor and Purchaser Act 1874.

Under the Vendor and Purchaser Act 1874,[5] any dispute arising between a vendor and purchaser of land, provided it is not a question affecting the existence or validity of the contract, may be determined by a summary application to a judge in chambers in the Chancery Division. The object of the Legislature in making this provision was to diminish specific performance actions, and to afford a cheaper and more speedy method of determining questions between vendor and purchaser. The

[1] 1 Wh. & Tu., 777.
[2] 2 Wh. & Tu., 510.
[3] *Alexander* v. *Mills*, 6 Ch. D., 124; 40 L. J., Ch., 73.
[4] Clarke & Humphrey's Sale of Land, 475.
[5] 37 & 38 Vict., c. 78, sec. 9.

exception, however, must be carefully noticed, and as to what is a "question affecting the validity or existence of the contract," this means only the existence or validity of the contract in its inception, that is, whether there was or was not, to commence with, a good contract; so that where there was a condition that the vendor should, under certain circumstances, have a right to rescind the contract, it was held that the Court had jurisdiction, on such a summons, to determine whether or not a valid notice to rescind had been given.[1] It was, at one time, thought that questions of law or construction only, and not disputed questions of fact, could be decided in this way, but it is now settled that whatever could be done in Chambers upon a reference as to title in a specific performance suit can be done on such a summons.[2] And the Court has power not only to answer the questions submitted to it, but also to enforce its opinion without any separate action,[3] and to direct such things to be done as are the natural consequences of the decision; so that where the vendor had not shown a good title, or answered the requisitions, the Court ordered the vendor to repay to the purchaser the deposit and interest thereon at 4 per cent., and also his costs thrown away of investigating the title.[4] But the Court has no jurisdiction, on such a summons, to make an order of this kind where the effect of the decision is to show that there is in fact no contract, for in such cases the purchaser must be left to his ordinary remedy by action to recover what he is, as a consequence of the decision, entitled to. Therefore, where a person bought leasehold premises, and had no notice of certain restrictive covenants in the

Re Jackson & Woodburn.

Re Hargreaves & Thompson.

Re Davis & Cavey.

[1] *Re Jackson & Woodburn*, 37 Ch. D., 44; 57 L. J., Ch., 243 57 L. T., 753.
[2] Carson's Real Property Statutes, 547; Brett's Eq. Cas., 330.
[3] *Thompson* v. *Ringer*, 44 L. T., 507; 29 W. R., 520.
[4] *Re Hargreaves & Thompson*, 32 Ch. D., 454; 56 L. J., Ch., 199 55 L. T., 239; Brett's Eq. Cas., 330.

lease, it was held, on a summons under the Act, that he was entitled to a declaration that the title was not such as he could be compelled to accept; but (without prejudice to his right to bring an action for return of his deposit, and interest thereon, and costs of investigating the title) that he was not entitled to any further relief upon the summons.[1] The Court has no jurisdiction on such a summons to decide a question which does not concern the purchaser, but deals with other persons' rights, *e.g.*, a question whether the vendor or some third person is entitled to the purchase-money.[2]

Specific delivery of chattels irrespective of contract.

Closely allied to the jurisdiction of the Court to decree specific performance of contracts, is the jurisdiction to decree specific delivery up of chattels, irrespective of contract. This the Court will do when the chattel is an heirloom, or something else of peculiar value to the owner, instead of leaving the party to his remedy at law by an action of detinue, or conversion.[3] The ground of the jurisdiction is the same as that upon which the specific performance of a contract is enforced, viz., that the obtaining of the specific thing is the object of the party, and that damages will not afford adequate compensation.[4] Thus, in *Pusey* v. *Pusey*,[5] specific delivery up of an ancient horn was decreed, on account of its peculiar value to the plaintiff, it having time out of mind gone along with his estate, and having been delivered to his ancestors, in ancient times, to hold their land by. And, in *Duke of Somerset* v. *Cookson*,[6] specific delivery of an ancient altar-piece was decreed in favour of the lord of the manor in which it had been

Pusey v. *Pusey*

Duke of Somerset v. *Cookson.*

[1] *Re Davis & Cavey*, 40 Ch. D., 601; 58 L. J., Ch., 143; 60 L. T., 100. See Indermaur & Thwaites' Conveyancing, 349, 350.
[2] *Re Tippett & Newbould*, 37 Ch. D., 444; 58 L. T., 754.
[3] See Indermaur's Principles of Common Law, 361, 362.
[4] 2 Wh. & Tu., 456.
[5] *Ibid.*, 454.
[6] *Ibid.*, 455.

found, and who was entitled to it as treasure trove. Many other instances might be given.[1] Upon this same principle, the Court will entertain jurisdiction to decree the specific delivery up of deeds or writings to the persons entitled to them.[2]

Specific delivery on account of fiduciary position.

And although a chattel wrongfully detained is of no special and peculiar value, yet if there subsists a fiduciary relationship between the parties, the Court will decree specific delivery, *e.g.*, goods wrongfully detained by a trustee, an agent, or a broker.[3]

Actions of detinue, and provisions of Common Law Procedure Act 1854.

Had the Court of Chancery not interfered in these cases, the plaintiff's only remedy would have been an action for damages for conversion, or an action of detinue, in which action the form of judgment was for the return of the goods or their value. However, by the Common Law Procedure Act 1854,[4] it was provided that the Court might, on the application of the plaintiff in such an action, order the return of the particular property, without giving the defendant the option of retaining it on paying its value. And although this enactment was repealed by the Statute Law Revision Act 1883,[5] the provision is substantially continued by Order XLVIII., rule 1. This is, however, merely a discretionary power, and, under it, the Court can only proceed to enforce the delivery by a sequestration of the defendant's property,[6] whilst a judgment or order in Equity for specific delivery could always be enforced by attachment.[7]

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[1] See *Fells* v. *Read*, 3 Ves., 70; *Lowther* v. *Lowther*, 13 Ves., 95.
[2] *Jackson* v. *Butler*, 2 Atk., 306.
[3] *Wood* v. *Rowcliffe*, 2 Ph., 283.
[4] 17 & 18 Vict., c. 125, sec. 78.
[5] 46 & 47 Vict., c. 49.
[6] See Indermaur's Manual of Practice, 212, 213.
[7] 2 Wh. & Tu., 459; see also *ante*, pp. 291, 292, for provision of the Sale of Goods Act 1893, as to specific delivery of chattels contracted to be sold.

CHAPTER VIII.

THE JURISDICTION OF THE COURT IN RESPECT OF THE PERSONS AND ESTATES OF INFANTS.

Origin of jurisdiction.

THE origin of the jurisdiction of the Court of Chancery over the persons and property of infants is very obscure, and has been a matter of much discussion. Most probably, it had its foundation in the prerogative of the Crown flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector; and partaking, as it does, more of the nature of a judicial administration of rights and duties in *foro conscientiæ*, than of a strict executive authority, it would naturally follow that it should be exercised by the Court of Chancery as a branch of the general jurisdiction originally confided to it. The Court's powers are then a delegation of the rights and duties of the Crown.[1]

Father natural guardian.

A father is the natural guardian of his children, and has the right to their custody, a right not, in general, to be disputed, and which may be enforced at law by means of a writ of *habeas corpus*.[2] The reason the father is by law entrusted with the care of his children is, because, by the law of nature, he is the responsible person, and it is generally supposed that he will best execute the trust reposed in him, for that, in a moral sense, it is a trust cannot be doubted.[3] It has, however, in modern times been found that harm and injustice may be done

[1] Story, 910-918.
[2] 1 Wh. & Tu., 525.
[3] Story, 920.

Custody of Children Act 1891.

by adhering too strictly to the law of nature, and the Common Law, and, therefore, to meet some particular evils, the Custody of Children Act 1891[1] now provides that the Court shall have full discretion to refuse the application of a parent[2] for the custody of his child detained from him, if satisfied that the parent has abandoned or deserted the child, or has otherwise so conducted himself that the Court ought to refuse to assist him to enforce his right to its custody.[3] The same Act also provides that the Court shall not order the delivery of a child to a parent who has abandoned or deserted it, or who has allowed another person to bring it up under circumstances which satisfy the Court that he was unmindful of his parental duties, unless, having regard to the child's welfare, the Court is satisfied he is fit to have its custody.[4] And where the Court does order a child to be given up to its parent, it may order such parent to repay any person or body that has been maintaining the child, such sum expended over the child as the Court thinks fit.[5] A very wholesome discretionary power is, therefore, thus given to the Court.

Power of father to appoint a guardian.

Not only has the father the right to the custody of his children, but, by the Act abolishing feudal tenures,[6] power is given to him to appoint a guardian to his legitimate[7] children until marriage or attainment of full age, either by deed or by will; and it may be noticed that such a deed appointing a guardian is substantially a testamentary instrument, and may be revoked, even by a will.[8] By the

[1] 54 Vict., c. 3.
[2] Parent includes any person at law liable to maintain such child or entitled to its custody, sec. 5.
[3] Sec. 1.
[4] Sec. 3.
[5] Sec. 2.
[6] 12 Car. II., c. 24.
[7] *Sleeman* v. *Wilson*, L. R., 13 Eq., 36.
[8] 1 Wh. & Tu., 512.

Wills Act 1837,[1] all general power of making a will by an infant is taken away, and an infant, therefore, can now only appoint a guardian to his children by deed.[2] If the father appoints more than one guardian, the office passes to the survivor[3]; and the father can authorise such survivor to nominate a successor to the deceased guardian.[4]

Rights of mother.

Guardianship of Infants Act 1886.

Until lately, a mother's rights over her legitimate children have not been properly recognised, but the Guardianship of Infants Act 1886[5] now confers important powers on the mother. It enacts[6] that on the death of an infant's father, the mother (if surviving) is to be the guardian of the infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father; and subject also to this, that where there is no guardian appointed by the father, or the father's guardian is dead or refuses to act, the Court may, if it thinks fit, appoint a guardian to act jointly with the mother. This power the Court will only exercise if it is really shown to be for the benefit of the infant, and the mere fact that the mother has married again, and that her second husband is of a different religion to that of the infant's father, is not sufficient.[7] This Statute also provides[8] that the mother of any infant may, by deed or will, appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father, if such infant is then unmarried; and, if guardians are appointed by both parents, they are to act jointly. In addition, the mother is empowered

Mother may appoint a guardian.

[1] 1 Vict., c. 26, sec. 7.
[2] 1 Wh. & Tu., 512.
[3] *Eyre* v. *Shaftesbury*, 2 P. Wms., 113.
[4] *Re Parnell*, L. R., 2 P. & D., 379; 41 L. J., P., 35.
[5] 49 & 50 Vict., c. 27.
[6] Sec. 2.
[7] *Re X., X.* v. *Y.* (1899), 1 Ch., 526; 68 L. J., Ch., 265; 80 L. T., 311.
[8] Sec. 3.

by deed or will to provisionally nominate some fit person or persons to act as guardian or guardians with the father after her death, and the Court then, if satisfied that for any reason the father is unfitted to be the sole guardian, may confirm such appointment.

Father's and mother's position now almost equal.

The father and mother, therefore, are now recognised as almost equally natural guardians of their children, with a right on death to transfer that power over to another. But the Guardianship of Infants Act 1886 [1] provides that the Court, which pronounces any divorce or judicial separation, may by its decree declare the parent, by reason of whose misconduct the decree is made, to be a person unfit to have the custody of the children of the marriage, in which case that parent is not, on the death of the other, entitled, as of right, to the custody or guardianship of such children. Thus, in a suit by the wife for divorce on the ground of adultery, coupled with cruelty, which was of an aggravated character, the Court, after pronouncing a decree nisi, made an order under this provision declaring the respondent to be an unfit person to have the custody of the children.[2]

Power of Divorce Court.

Appointment of guardian by a stranger.

The direct power of appointing a guardian, though existing in the parents, does not exist in any one else; but yet in an incidental way, and to a certain extent, a stranger may practically appoint or select a guardian. For if substantial benefits are given to an infant by a stranger who professes to appoint, or who desires to appoint, a certain guardian, generally, if the infant has no parent living, the Court will give effect to this desire, and itself appoint the person selected by the stranger, if he appears to be

[1] 49 & 50 Vict., c. 27, sec. 7.
[2] *Skinner* v. *Skinner*, 13 P. D., 90; 57 L. J., P., 104. As to the effect of such an order, see *Webley* v. *Webley* 64 L. T., 839.

a fit person. And a father may even act in such a manner as to render an appointment by a stranger effectual; for where a benefit is conferred either upon children, or upon their father, on condition that the father gives up the guardianship of them, then, if he accepts the benefit himself, or commits the care of the children to the guardian nominated by the stranger, he will not afterwards be allowed to prejudice their interests by interfering to take them again into his custody.[1] But the Court will not deprive a father of the custody of his children merely because to do so would be to their pecuniary advantage, *e.g.*, where a person makes an offer to maintain and advance them if given into his custody.[2]

Appointment of guardian by the Court.

When there is existing no guardian for an infant, then the jurisdiction of the Court is at once exercisable, and the Court, on being applied to, will appoint a guardian; and this even for a child born and resident abroad, if he is a child of English subjects.[3] But, in any case, though the Court possesses jurisdiction, it will not ordinarily interfere unless the infant has some property within the jurisdiction of the Court, because of the want of means to exercise its jurisdiction with effect.[4] Where, therefore, it is desired to make an infant, who has no property, a ward of Court, it is the common practice to make some small settlement upon the infant of money or other property,[5] or to pay a sum of money (£50 or upwards) into Court to the credit of the infant. But the power of the Court does not stop here, for whoever may be the guardian,

Removal of guardian.

[1] *Blake* v. *Blake*, Amb., 306; 1 Wh. & Tu., 497.
[2] *Re Fynn*, 2 De G. & Sm., 457; 1 Wh. & Tu., 498.
[3] *Hope* v. *Hope*, 4 D. M. & G., 328; *Re Willoughby*, 30 Ch. D., 324; 54 L. J., Ch., 1122; 53 L. T., 926; 33 W. R., 850.
[4] *Wellesley* v. *Duke of Beaufort*, 2 Russ., 21; 2 Bligh, N. S., 124.
[5] *Re Lyons*, 22 L. T., 770.

and by whatever authority the guardian may be acting, the Court will interfere and remove the infant from his custody and appoint a new guardian should occasion require. And the Guardianship of Infants Act 1886[1] also contains an express provision that the Court, if satisfied that it is for the infant's benefit, may remove any testamentary guardian, or guardian appointed, or acting, by virtue of that Act, and may also appoint another guardian in place of the one removed. In all cases the guardianship is treated as a delegated trust for the benefit of the infant, and, if it is abused, or in danger of abuse, the Court interferes. When the conduct of the guardian does not require so strong a measure as removal, the Court will interfere, and regulate, and direct his conduct, and may require security to be given by the guardian if there is any danger of injury to the infant's person or property.[2]

Removal from custody of father.

But for the Court to interfere with the custody of the natural guardian—the parent—a very strong case must be made out, such as that the parent is living in open immorality, or is guilty of constant drunkenness, or continually ill-treats the children, or generally that the parent's conduct is such that it will probably be injurious to the morals and interests of the children.[3] Thus, in *Wellesley* v. *Duke of Beaufort*,[4] where it was shown that the father was profligate, his language often profane, and that he was living in open adultery with another man's wife, the custody of the children was taken from him. But where, although a father was living in adultery, he did not bring the child in contact with the woman with whom he was living, the Court refused to interfere.[5]

Wellesley v. *Duke of Beaufort.*

[1] 49 & 50 Vict., c. 27, sec. 6.
[2] Story, 919. [3] *Ibid.*, 920.
[4] 2 Rus., 1 ; 2 Bligh, N. S., 124.
[5] *Ball* v. *Ball*, 2 Sim., 35.

Re Agar-Ellis, Agar-Ellis v. *Lascelles.*

The general subject of a father's position with regard to his children was much considered in the case of *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*,[1] and it was laid down by the Court of Appeal, that the father has the legal right to control and direct the education and bringing up of his children until they attain twenty-one, even though they are wards of Court, and that the Court will not interfere with him in the exercise of his paternal authority, except —(1) When, by his gross moral turpitude, he forfeits his right; or (2) When he has by his conduct abdicated his right; or (3) When he seeks to remove his children, being wards of Court, out of the jurisdiction, without the consent of the Court. And it is presumed that now, since the Guardianship of Infants Act 1886, the same rules would substantially apply to a mother after the father's death.

When no misconduct on the part of the father, he formerly had absolute right to children.

It should be observed that the whole jurisdiction of the Court was founded on principles of preventive justice, and that, unless misconduct was shown, the Court would not deprive the father of his children's custody; so that although for young and delicate children, and particularly female children, nature seems to point to the mother as being the fittest person to have their custody, yet, in the absence of misconduct, the father would have the right, so that on a separation he might insist on taking all the children away from the mother. It was even held that a clause in a separation deed giving the custody to the mother was contrary to public policy, and would not be enforced unless the circumstances were such that, had the Court been applied to, it would have removed the children from the father's custody.[2] This state of the law was, however,

Provision in deed of separation.

[1] 24 Ch. D., 317; 53 L. J., Ch., 10; 50 L. T., 161.
[2] *Vansittart* v. *Vansittart*, 2 De G. & J., 249; *Swift* v. *Swift*, 34 Beav., 266.

considerably modified by the Infants Custody Act 1873,[1] and the Guardianship of Infants Act 1886 also contains an important provision on the subject.[2]

Infants Custody Act 1873, as to agreement relating to custody of children.

To deal firstly with the Infants Custody Act 1873, this Statute alters the original rule of the Court, by enacting that no agreement contained in a separation deed, made between the father and mother of an infant, shall be held to be invalid by reason only of its providing that the custody or control of the infant shall be given to the mother; but that no Court shall enforce any such agreement if of opinion that it will not be for the benefit of the infant to do so.[3] The question of enforcing, or not enforcing, such an agreement is entirely in the discretion of the Court, such discretion being arrived at from a consideration of what will be for the real benefit of the children. Thus, in one case, in which a female infant, about eight years old, had been made a ward of Court, it was shown that, on separation of the parents, the father had agreed that she should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious education, and she had also published and circulated what the Court was of opinion was an obscene book. It was held that to bring up the child in the religion of the father was a duty the Court owed to its ward, and was not affected by the covenant in the separation deed; and also that the refusal of religious instruction to the child, and the publication of the book, were in themselves sufficient grounds for removing her from the mother's custody.[4] But if there are special

Re Besant.

[1] 36 Vict., c. 12. This Statute replaced an earlier one, 2 & 3 Vict., c. 54, known as Talfourd's Act.
[2] 49 & 50 Vict., c. 27, sec. 5.
[3] 36 Vict., c. 12, sec. 2.
[4] *Re Besant*, 12 Ch. D., 605; 48 L. J., Ch., 497.

circumstances showing it to be for the benefit of the infant, the Court has power, under the Infants Custody Act 1873, to give effect even to a provision in a separation deed with regard to the child's religious control and education.[1]

As to religion in which child to be educated.

With regard, however, to what is stated at the conclusion of the last paragraph, as to the Court possibly giving effect to a contract by the father with regard to the religion in which his child should be brought up, it should be carefully noticed that it has reference only to the question of whether a provision to that effect in a separation deed is for the infant's benefit. In other cases, the general rule is that the religion of its father is to be followed, unless the child is of some reasonable age of discretion, and not of very tender years, and has already received education in another religion to such an extent as to render it dangerous and improper to attempt any change.[2] And it has been held that even an *ante-nuptial* contract, made by a father, to have the children brought up in a particular religion, cannot be enforced, since a father cannot abdicate his right to have his children brought up in accordance with his own religious views.[3] It has been decided that the Guardianship of Infants Act 1886,[4] in conferring certain powers of guardianship on a mother after the father's death, as already detailed,[5] does not affect the right of the father to determine the religion in which his children shall be brought up, even after his death.[6]

Re Agar-Ellis, Agar-Ellis v. *Lascelles.*

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[1] *Condon* v. *Vollum*, 57 L. T., 154.

[2] *Re Newton* (1896), 1 Ch., 740; *Stourton* v. *Stourton*, 8 De G., M. & G., 760; and see *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, at p. 74 of 10 Ch. D.

[3] *Re Agar-Ellis, Agar-Ellis* v. *Lascelles*, 10 Ch. D., 49; 48 L. J., Ch., 1; Brett's Eq. Cas., 98.

[4] 49 & 50 Vict., c. 27.

[5] *Ante*, pp. 311, 312.

[6] *Re Scanlan*, 57 L. J., Ch., 718; 59 L. T., 599.

Guardianship of Infants Act 1886, as to making orders as to custody of infants.

Although, as has been stated, the father has the primary right to the custody of his children, subject to the power of the Court to deprive him of such custody if he is conducting himself in such a way as may be prejudicial to them, it is now possible that, irrespective of this, the Court in its discretion may deprive him of their custody though he is not guilty of any misconduct. This is by reason of the Guardianship of Infants Act 1886,[1] which provides that the Court may, on the application of the mother, make such order as it thinks fit regarding the custody of an infant and the right of access of either parent having regard to the infant's welfare, the conduct of the parents, and the wishes of the father and mother; and may alter, vary, or discharge such order on application of either parent, or (after the death of either parent) of any guardian under that Act; and may make such order as to the mother's costs, and the father's liability therefor, or otherwise as to costs, as it thinks just. It has been held that the Court has jurisdiction to order the delivery of an infant to the custody of its mother, without fixing any limit of age.[2] This provision overrides a former enactment which was contained in the Infants Custody Act 1873,[3] and which is now repealed.[4] The acceding to, or refusing, any such application by the mother is a matter for the Court's discretion, which is to be exercised on a consideration of three matters, viz.: the paternal right, the marital duty, and the interest of the child.[5] If the mother has herself been guilty of any material misconduct, this will certainly disentitle her to ask the Court to exercise the discretion vested in it by this Act.[6]

[1] 49 & 50 Vict., c. 27, sec. 5.
[2] *Re Witten*, 57 L. T., 336.
[3] 36 Vict., c. 12, sec. 1, and see before this 2 & 3 Vict., c. 54.
[4] 56 & 57 Vict., c. 95 (Statute Law Revision Act, 1893).
[5] *Re Elderton*, 25 Ch. D., 220; 53 L. J., Ch., 258; 59 L. T., 26.
[6] *Re Besant*, 12 Ch. D., 605; 48 L. J., Ch., 497.

General jurisdiction of Court now on father's application for custody.

By reason of the Guardianship of Infants Act 1886, the Custody of Children Act 1891, and the general jurisdiction of the Court of Chancery, already dealt with, and of the fusion effected by the Judicature Act 1873,[1] on any attempted enforcement by the father in the King's Bench Division, by *habeas corpus*, of his right to the custody of the person of his child, the Court will look at all the surrounding circumstances before they will accede to the application of the father.[2]

Maintenance.

Besides appointing a guardian, the Court will also, where necessary, order an allowance to be paid out of the property of the infant for maintenance. To get maintenance allowed for an infant, it is by no means always necessary to seek the assistance of the Court. For, firstly, the settlement, or will, under which the infant derives his or her property, may contain a direct trust for the income, or part thereof, to be applied for maintenance. Secondly, the Conveyancing Act 1881[3] gives trustees full discretionary power of applying, for the benefit of any infant, the income of any property he or she is entitled to absolutely, or is entitled to contingently on attaining twenty-one or upon any earlier event[4]; and it has been held that where a testator bequeaths the residue of his personal estate absolutely to an infant, the

[1] See 36 & 37 Vict., c. 66, sec. 25 (10).

[2] See *Re Ethel Brown*, 13 Q. B. D., 614. It may also be noticed that by the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 29, sec. 5), it is provided that on a magistrate making an order under that Act (which is to have the effect of a judicial separation between husband and wife), he may give to the wife the legal custody of the children of the marriage up to the age of sixteen years, an order which she could enforce obedience to by writ of *habeas corpus* only. With regard to the power of the Divorce Court, as to the custody of children, see 20 & 21 Vict., c. 85, sec. 35; 22 & 23 Vict., c. 65, sec. 4.

[3] 44 & 45 Vict., c. 41, sec. 43.

[4] See as to the construction of this provision, *Re Dickson*, *Hill* v. *Grant*, 29 Ch. D., 331; 54 L. J., Ch., 510; 52 L. T., 707; *Cadman* v. *Cadman*, 33 Ch. D., 397; 55 L. J., Ch., 833; 55 L. T., 569. See also Indermaur & Thwaites' Conveyancing, 487, 488.

executor is to be considered a trustee under this provision, and able to apply the income for the infant's maintenance.[1] Thirdly, failing the obtaining of maintenance in either of these ways, the only course is to apply to the Court, which application may be made by an originating summons in Chambers, if there is no suit pending, or if any suit is pending, then by an interlocutory summons taken out therein.[2]

When maintenance allowed by the Court.

When the infant has no father living, or when the infant is removed from the father's custody, the Court will always direct an allowance to be paid to the guardian, out of the infant's property, for maintenance, for how otherwise can the infant be properly maintained? If, however, the father is living, and the infant is residing with him, then the Court only allows maintenance if the father has not the means to properly maintain the infant.[3] When the question turns upon the ability of the father to maintain the child, the rule is, not that maintenance is allowable only upon the father's absolute insolvency or state of poverty being shown, but that it is allowed where he is not in such circumstances as to be able to give the child such a maintenance and education as is suitable to the fortune which he or she expects. Thus, in one case, although the father had an income of £6,000 a year, an allowance was ordered to be made to him of £1,400 a year towards the maintenance of his six children, who were entitled to an estate of £8,600 a year.[4]

Principle as to amount to be allowed for maintenance.

When the Court allows maintenance, it does not always act strictly on the view of the direct main-

[1] *Re Smith, Henderson-Roe* v. *Hitchens*, 42 Ch. D., 302; 58 L. J., Ch., 860; 61 L. T., 363.
[2] See Indermaur's Manual of Practice, 290, 328.
[3] Story, 929, 930.
[4] *Jervois* v. *Silk*, Coop., 52.

tenance and education of the infant being the only object to be attained, but it has a liberal regard to the circumstances and state of the family to which the infant belongs. For example, if one child only has property, and the other children have no provision made for them, an ample allowance will be ordered for the infant entitled to the property, so that practically the others may be maintained thereout; and similar considerations are applied to a father or mother of the infant if he, or she, is in distress or narrow circumstances.[1] This certainly, in an indirect way, benefits the particular infant, for it could hardly be for his real benefit to be fed, clothed, and educated in a totally different style from his or her brothers and sisters, or to be indulged in luxuries whilst the parents, with whom he or she was residing, were living scantily. And, where it will be for the benefit of the infant, maintenance will sometimes be allowed, although there be an express direction to accumulate; and though there is a limited gift of interest for maintenance, with an express direction to accumulate the rest, the Court will in some cases allow such further sum as may be deemed adequate to maintain the infant properly.[2] Beyond this, where the property is small, and more means are necessary for the due maintenance of the infant, the Court will sometimes even allow the capital to be broken in upon; but without the express sanction of the Court a trustee should never break in upon capital, unless there is a power of advancement in the trust instrument. But where a trustee has, on his own responsibility, made an advancement, the Court will not call him to account for having done so if the circumstances were such that, had the Court been applied to, it would have sanctioned

Ordering maintenance though accumulation directed.

[1] Story, 930.
[2] *Stretch* v. *Watkins*, 1 Madd., 254.

it, *e.g.*, to pay for the infant being apprenticed, or articled.[1]

Allowance for past maintenance.

Not only may an allowance be made for the future maintenance of an infant, but also in respect of his past maintenance. But there is this distinction between future and past maintenance, that whilst the allowance for future maintenance is, as has been stated, in accordance with the fortune of the infant and other circumstances, the amount allowed for past maintenance is only what has been actually properly expended.[2] When an allowance is made for the future maintenance of an infant, and the guardian to whom it has been paid has properly maintained, educated, and supported the infant thereout, he cannot be called upon to vouch the items of his expenditure, or to account for any surplus which may remain.[3]

No account required from guardian.

Who is a ward of Chancery.

Although, strictly speaking, a ward of Chancery is a person who is under a guardian appointed by the Court, yet, where a suit is instituted in the Chancery Division relative to the person or property of an infant, although the infant is not under the control of any guardian appointed by the Court, he or she is treated as a ward of Court, and as being under its special cognizance and protection. In all such cases no act can be done affecting the infant's person or property without the Court's sanction, for every act done without such sanction is treated as a violation of the Court's authority, and the person guilty of it is said to have committed a contempt of Court, and is liable to attachment.[4] Thus, in the leading case of *Eyre* v. *Countess of Shaftesbury*,[5] the mother of a ward

General rule as to treatment of wards.

Eyre v. *Countess of Shaftesbury*.

[1] Story, 931; *Re Welch*, 23 L. J., Ch., 344; and see also now the Judicial Trustees Act 1896 (59 & 60 Vict., c. 35, sec. 3).

[2] *Parsons* v. *Parsons*, 13 W. R., 214.

[3] *Hora* v. *Hora*, 33 Beav., 89.

[4] Story, 927, 928.

[5] 1 Wh. & Tu., 473.

of Court, who contrived and effected his marriage without obtaining the consent of the Court, was held liable for a contempt of Court, although the marriage was in other respects proper. And it is a contempt of Court to take an infant ward out of the jurisdiction without leave of the Court, but such leave will be given in exceptional cases, when it is shown to be for the benefit of the ward, and generally reasonable under the circumstances, *e.g.*, temporarily to visit near relatives who reside abroad, or for the benefit of the infant's health, or even to reside abroad permanently if sufficient security is given that future orders will be obeyed.[1] As it is manifestly impossible for the Court itself to watch the actions of all its wards, it is the duty of the guardian to inform the Court from time to time of what is taking place, as of any misconduct on the part of the ward, or of difficulties in which he or she has become involved[2]; and the infant and guardian, or either of them, may be ordered to attend personally before the Judge in chambers on any matter, and any such order may be enforced by means of the serjeant-at-arms if the parties are within the jurisdiction.

Duty of guardian to inform Court.

As has been pointed out, for a ward of Chancery to marry without the Court's sanction is a contempt of Court, and, it should be added, that all persons concerned therein are guilty of contempt, and this even though ignorant of the fact of the wardship.[3] Application for leave for a ward to marry must, therefore, be made, supported by evidence of the fitness of the match, and the question of what is a proper settlement to be made will be considered, and the settlement will be prepared by one of the

Marriage of a ward.

Settlement of ward's property.

[1] *Re Callaghan, Elliott* v. *Lambert*, 28 Ch. D., 186; 54 L. J., Ch., 292; 52 L. T., 7.
[2] *Kay* v. *Johnson*, 21 Beav., 538.
[3] Story, 933.

official conveyancing counsel, and approved by the Court. And, where proposals for a settlement on the marriage of a ward have been entertained, the parties will not be allowed to defeat the intentions of the Court by deferring the marriage until the ward comes of age, and then making a different settlement.[1] When a marriage takes place in contempt of the Court, and the husband is attached for such contempt, the ordinary rule is not to liberate him until he makes a proper settlement, and, if he knew the lady to be a ward of Court, ordinarily the settlement will be of such a nature as to exclude him from all interest in the property; but if he was ignorant of the wardship, then he is generally treated more leniently, but the nature and details of the settlement are matters entirely in the Court's discretion.[2]

Injunction to prevent marriage of ward.

With the view of preventing evil, if it is brought to the Court's knowledge that there is reason to suspect the intended and improper marriage of a ward without its consent, the Court will interfere by injunction to prevent the marriage; and it will even go so far as to interdict communications between the ward and the admirer, and if the guardian is suspected of any connivance it will remove the infant from his custody.[3]

The Court cannot in direct terms compel a settlement.

Beyond, however, acting in this way—that is, by refusing to allow a ward to marry without its consent, and by acting against the husband and other persons under the process of contempt, and by preventing a man who has married a ward, without the Court's consent, from profiting thereby—the Court of Chancery has never had, and the High Court has

[1] *Hobson* v. *Ferraby*, 2 Coll., 412; *Money* v. *Money*, 3 Drew, 256.
[2] 1 Wh. & Tu., 505.
[3] Story, 934.

not now, any jurisdiction either in its exercise of the rights of the Crown as *parens patriæ*, or on the ground of contempt, to compel the settlement of a ward's property.[1]

Provisions of Infants Settlement Act 1855.

As to capacity to make a settlement, it must be remembered that, under the Infants Settlement Act 1855,[2] as regards infants generally, whether wards of Court or not, a valid marriage settlement may be made with the sanction of the Court, in the case of a male at the age of twenty years, and in the case of a female at the age of seventeen years. But if the infant is a tenant in tail and, in order to make the settlement, exercises a power of appointment over the entailed land or executes a disentailing assurance, it is provided that such appointment or disentailing assurance shall only be effectual if the infant lives to attain full age.[3] Subject, however, to this exception, a settlement thus made by an infant, and all covenants therein by the infant, are absolutely binding.[4] The Act even enables a post-nuptial settlement to be made with the Court's sanction.[5] But the Infants Settlement Act 1855, has only removed the disability of infancy, and leaves unaffected other disabilities, *e.g.*, coverture[6]; so that under its provisions, an infant married woman cannot do more than an adult married woman can do, and is unable therefore to deal with reversionary interests in personal property not held by her to her separate use, and not within

Limited effect of the Act.

[1] *Buckmaster* v. *Buckmaster*, 35 Ch. D., 21; 56 L. J., Ch., 379; 56 L. T., 795; 1 Wh. & Tu., 507.

[2] 18 & 19 Vict., c. 43.

[3] *Re Scott*, *Scott* v. *Hanbury* (1891), 1 Ch., 298; 60 L. J., Ch., 461; 63 L. T., 800.

[4] *Re Johnson*, *Moore* v. *Johnson* (1891), 3 Ch., 48; 68 L. J., Ch., 499; 6 L. T., 696.

[5] *Re Sampson & Wall*, 25 Ch. D., 412; 53 L. J., Ch., 457; 50 L. T., 435.

[6] *Seaton* v. *Seaton*, 13 App. Ca., 61; 57 L. J., Ch., 661; 58 L. T., 565; affirming decision below, *sub. nom Buckmaster* v. *Buckmaster*, *supra*.

the provisions of Malins' Act,[1] which enacts that a married woman entitled to a reversionary interest in personal property under an instrument executed since 31st December, 1857, shall be enabled to dispose thereof by a deed duly acknowledged, together with her husband.

Settlements by infants without the Court's sanction.

Edwards v. *Carter.*

But though a settlement by an infant is only completely binding if made under the provisions of the Infants Settlement Act 1855, yet any settlement by an infant is not absolutely void, but is merely capable of being avoided by the infant within a reasonable time of coming of age, and if the infant does not within such reasonable time repudiate it, he or she will be bound by it.[2] There is no absolute rule as to what is a reasonable time; but a reasonable time to repudiate, as regards a covenant therein by a female infant to settle her future acquired property, is when she first becomes entitled to such property, even if that be thirty-six years after the settlement.[3] And if a settlement is thus made by an infant without the Court's sanction, and the infant derives a benefit under it from the other party to it, a case of election may arise, and the infant be prevented from repudiating the settlement and, at the same time, claiming benefits thereunder.[4]

Appointment of guardian to oreign child.

A child of foreigners, who are resident in England, may, if possessed of property in England, be made a ward of Court, and this even although the child is under the control of a guardian appointed by the foreign Court. This is only, however, for the

[1] 20 & 21 Vict., c. 57. See *post*, p. 448.

[2] *Edwards* v. *Carter* (1893), A. C., 360; 69 L. T., 153; *Re Jones, Farrington* v. *Forrester* (1893), 2 Ch., 461; 62 L. J., Ch., 996; 69 L. T., 45.

[3] *Re Jones, Farrington* v. *Forrester, supra; Sm* v. *Lucas*, 18 Ch D., 531; 45 L. T., 460.

[4] See *post*, pp. 344, 345.

purpose of supplementing the office and duties of the foreign guardian, and no interference with his control over the person of the ward will be allowed, unless some case of abuse of the power is shown.[1]

Jurisdiction to idiots and lunatics not the Court.

The position of idiots and lunatics resembles that of infants to this extent, that protection is required both in respect of their persons and property, but this jurisdiction is not vested in the Court. The custody of the persons and estates of lunatics and idiots was originally vested in the lord of the fee, but by certain ancient statutes[2] this power was vested in the Crown, with the distinction, however, that in the case of a lunatic the Sovereign was a mere trustee, but in the case of an idiot he had a beneficial interest.[3] The jurisdiction being in the Sovereign, it appears by him to have been specially delegated to the Chancellor in his individual capacity as an officer of high standing in close connection with the Crown, and not to the Court of Chancery.[4] And at the present daythis jurisdiction is vested in the Lord Chancellor, and such other Judges of the High Court, or Court of Appeal, as are entrusted with it by the Sovereign's Sign Manual,[5] who in actual practice are the Lords Justices of His Majesty's Court of Appeal. The Lunacy Judge has all the jurisdiction of the Chancery Division for making orders which require to be made in the High Court as well as in lunacy.[6]

When, however, the Court may act to a certain extent.

But, notwithstanding that the jurisdiction as to persons *non compos mentis* is not in the Court of

[1] *Nugent* v. *Vetzera*, L. R., 2 Eq., 704 ; 35 L. J., Ch., 777.
[2] 7 Ed. II., c. 9 ; 17 Ed. II., c. 10.
[3] *Re Fitzgerald*, 2 Sch. & Lefr., 436. Practically, this distinction is of no importance now, as the inquiry as to a person's state of mind is never carried back to the date of his birth, which would be necessary to have him declared an idiot. See Elmer's Lunacy Practice, p. 3.
[4] Story, 936-939.
[5] See 36 & 37 Vict., c. 66, sec. 17 ; 38 & 39 Vict., c. 77, sec. 17.
[6] See *Re Platt*, 36 Ch. D., 410 ; 57 L. J., Ch., 152 ; 57 L. T., 857.

Chancery, yet where a person has not actually been found a lunatic by inquisition, the Chancery Division has an original jurisdiction, where the property is small, to give directions as to his maintenance though not to appoint a guardian of his person.[1] But this only applies if the property is under the control of the Court[2]; and the jurisdiction is not because of the unsoundness of mind, but in spite of it.[3]

Lunacy Act 1890.

The powers of the Lunacy Judge over the person and the property of a lunatic are to be found in sections 108 to 149 of the Lunacy Act 1890.[4] The powers which are vested in the Lunacy Judge under those sections, relating to management and administration of property, apply:—(1) to lunatics so found by inquisition, (2) to every person lawfully detained as a lunatic, though not so found by inquisition, (3) to every person who is proved to the satisfaction of the Lunacy Judge to be incapable of managing his affairs through mental infirmity arising through disease or age, (4) to every person whose property does not exceed £2,000 net value, or the income whereof does not exceed £100 per annum net, if the Lunacy Judge is satisfied he is of unsound mind and incapable of managing his affairs, and (5) to every criminal lunatic who continues to be insane and in confinement.[5] The Lunacy Judge may order money to be raised out of the property of any person of the five kinds just enumerated, in order to pay his debts, and to discharge incumbrances on his property, and to pay for his past or future

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[1] *Vane* v. *Vane*, 2 Ch. D., 124; 45 L. J., Ch., 381; *Re Bligh*, 12 Ch. D., 361; 49 L. J., Ch., 56.

[2] *Re Brandon*, 13 Ch. D., 773; *Re Tuer*, 32 Ch. D., 39; 55 L. J., Ch., 454; 54 L. T., 910; *Re Grimmett*, 56 L. J., Ch., 419.

[3] Per James, L.J., in *Bull* v. *Smith*, L. R., 9 Ch., 85.

[4] 53 & 54 Vict., c. 5.

[5] Sec. 116.

maintenance, or otherwise for his benefit,[1] or the maintenance or benefit of him and his family,[2] and to permanently improve his property,[3] and may authorise any sale, exchange, partition, lease, or surrender, and can exercise any power which is vested in such person for his own benefit.[4] But surplus moneys arising from any sale, mortgage, or disposition of property are to be considered, as between the person's devisees or heirs and his legatees or next-of-kin, of the same nature as the property itself.[5]

[1] 53 & 54 Vict., c. 5, sec. 117.
[2] Sec. 116 (4).
[3] Sec. 118.
[4] Sec. 120.
[5] Sec. 123.

CHAPTER IX.

PARTITION, ETC.

Different ways of effecting a partition.

JOINT owners, be they joint tenants, tenants-in-common, or co-parceners, are not usually desirous of continuing to thus hold conjointly, but prefer to have a division or partition of the estate. This partition may be effected by mutual arrangement between themselves, without any assistance from the Court, or sometimes it is effected through the agency of the Board of Agriculture, under the provisions of the General Enclosure Act 1845[1]; but, ordinarily, if the parties cannot agree between themselves, or it is impossible to do so by reason of disability of some of the parties, or otherwise, the course is to apply to the Chancery Division of the Court for a partition.

Partition at Law compared with the remedy in Equity.

There was always a mode of effecting partition at Common Law by means of a writ of partition, a remedy by no means satisfactory, on account of its insufficiency, and the Court of Chancery, at a very early date, therefore, assumed jurisdiction, because of the judicial incompetency of the Courts of Common Law to furnish a plain, complete, and adequate remedy for such cases.[2] As an instance of the insufficiency of the remedy at Law, may be mentioned the fact that the powers of the Courts of Law were confined to a mere partition or allotment of the lands, having regard to the parties' interests

[1] 8 & 9 Vict., c. 118, secs. 147-150; see Indermaur & Thwaites' Conveyancing, 34.

[2] Mitford's Eq. Pl. by Jeremy, 120.

and the true value; but the Court of Chancery could, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for equality of partition, so as to prevent any injustice or unavoidable inequality.[1] Many other points might be mentioned, but this in itself seems sufficient justification for the Court of Chancery having assumed jurisdiction. The remedy, therefore, in Equity, was concurrent, but it naturally became the one usually adopted, and as the writ of partition was abolished in the year 1833,[2] the jurisdiction then became exclusive, and the Judicature Act 1873[3] assigned such matters to the exclusive jurisdiction of the Chancery Division.

The mode of effecting partition.

The mode of effecting partition in Chancery was by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and, upon the return of the commissioners, and confirmation of the return by the Court, the partition was finally completed by mutual conveyances of the allotments made to the several parties.[4] In modern practice, however, a commission is not issued, but any enquiries that may be necessary as to the rights of the parties, the nature and value of the estate, and the like, are made in the Judge's Chambers; and if no enquiries are necessary, the partition can at once be made at the hearing.[5]

Of what property partition can be made.

At the present day, partition may be made of freehold, copyhold, and leasehold property. At Common Law, only co-parceners could claim partition; but,

[1] Story, 432.
[2] 3 & 4 Wm. IV., c. 27, sec. 6.
[3] 36 & 37 Vict., c. 66, sec. 34.
[4] Mitford's Equity Pl., 120.
[5] 1 Wh. & Tu., 202.

Who may claim partition.

by the Statutes of Partition[1] joint tenants, and tenants-in-common, have an equal right. But a person can only compel partition when entitled in possession, so that a joint tenant or tenant-in-common, entitled in reversion or remainder, cannot maintain such an action.[2] The mortgagee of some joint owner may maintain an action for foreclosure and partition[3]; but the owner of an equity of redemption of an undivided share in property is not entitled to bring a partition action until he has redeemed the incumbrances upon his own share.[4] A person can only maintain an action for partition where he manifestly is entitled to an undivided share in the property in question, and no litigation is necessary to determine whether he is interested in the estate. Thus, where the question of whether the party is interested or not turns on the construction of a will, he cannot bring a partition action for the purpose of trying his disputed title.[5]

As to directing a sale.

It is manifest that, in a great number of partition actions, a sale of the property would be more convenient and beneficial for the parties than an actual partition. Formerly, the power of the Court in this direction was very limited; for though the Court might, where it was desired, direct a sale, and would do so even if there were persons not *sui juris* concerned, if the other parties desired it, yet, if one person *sui juris* objected to a sale, the Court was powerless to decree a sale, however injurious the not doing so would be to the interests of the other parties. But this is not so now, very considerable alterations having been made by the Partition Act 1868.[6]

[1] 31 Hen. VIII., c. 1; 32 Hen. VIII., c. 32, sec. 1.
[2] *Evans* v. *Bagshaw*, L. R., 5 Ch. Apps., 340.
[3] *Fall* v. *Elkins*, 9 W. R., 861.
[4] *Sinclair* v. *James* (1894), 3 Ch., 354; 63 L. J., Ch., 873; 71 L. T., 483.
[5] *Slade* v. *Barlow*, L. R., 7 Eq., 296; 36 L. J., Ch., 369.
[6] 31 & 32 Vict., c. 40.

Partition Act 1868.

This Act contains three distinct provisions, to the following effect :—

1. If it appears to the Court that—by reason of the nature of the property, or the number of the parties interested, or the absence, or disability, of any such parties, or of any other circumstances—a sale of the property, and a distribution of the proceeds, would be more beneficial for the parties interested than a division of the property between them, the Court *may*, on the request of any interested party, and notwithstanding the dissent or disability of any other party, direct a sale.[1]

2. If any party or parties, interested individually or collectively to the extent of a moiety or upwards, request a sale and a distribution of the proceeds, instead of a division of the property, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property accordingly.[2]

3. If any party interested requests the Court to direct a sale and a distribution of the proceeds, instead of a division of the property, the Court may direct a sale unless the other parties interested in the property, or some of them, undertake to purchase the party's share; and, in case of such undertaking being given, the Court may order a valuation of the particular share in such manner as it thinks fit.[3]

Distinctions between the three provisions of the Partition Act 1868.

It is necessary to distinguish between these three provisions. The first provision is a discretionary power vested in the Court, which it may exercise where, for any of the reasons specified in the section, it appears to be more beneficial to do so—that is, more beneficial in a pecuniary sense. The second provision is an imperative one, unless the Court sees

[1] 31 & 32 Vict., c. 40, sec. 3.
[2] Sec. 4.
[3] Sec. 5.

some reason against it, for persons interested to the extent of a moiety are, under it, entitled to a sale, as of right, without showing any reason for it, unless some cause to the contrary is shown.[1] The third provision is quite distinct, comprising cases in which the Court does not see that it is necessarily beneficial, and in which the request is not made by persons interested to the extent of a moiety; it is, in fact, a power given to any party to apply, with or without any reason, for a sale, and such party is entitled to ask for it unless some other party offers to buy his share, and then if, he applying for it, one of the parties does offer to buy his share, he may withdraw his request, for there is nothing to compel him to sell his share at a valuation.[2] On any sale under the Act, the Court may allow any interested party to bid.[3]

Difficulties under the Partition Act 1868, and consequent provisions of the Partition Act 1876.

It was doubtful whether, under the Partition Act 1868, a decree could be made for the sale of an estate unless the plaintiff's bill of complaint contained a prayer for a partition as well as for a sale.[4] To settle the law on this point, it is provided by the Partition Act 1876,[5] that an action for partition shall include an action for the sale and distribution of the proceeds, and that, in an action for partition, it shall be sufficient to claim a sale and distribution of the proceeds, and that it shall not be necessary also to claim a partition. A difficulty also arose under the first provision in the Act of 1868, in that it was held that an order could not be made in a direct way at the request of an infant; and also, under the third provision, that a

[1] *Pemberton* v. *Barnes*, L. R., 6 Ch., 685; 40 L. J., Ch., 675.
[2] *Pitt* v. *Jones*, 5 App. Ca., 651; 49 L. J., Ch., 795; *Drinkwater* v. *Ratcliffe*, L. R., 20 Eq., 528; 44 L. J., Ch., 605; *Williams* v. *Games*, L. R., 10 Ch. Apps., 204; 44 L. J., Ch., 245.
[3] 31 & 32 Vict., c. 40, sec. 6.
[4] *Holland* v. *Holland*, L. R., 13 Eq., 406; 41 L. J., Ch., 220.
[5] 39 & 40 Vict., c. 17, sec. 7.

married woman could not enter into an undertaking to purchase unless her husband joined therein. These points have, however, been met by the Partition Act 1876,[1] which provides that in an action for partition, a request for a sale may be made, or undertaking given, on the part of any person under disability, by the next friend, guardian, committee in lunacy authorised by order in lunacy, or other person authorised to act on behalf of the person under such disability; but that the Court shall not be bound to comply with any such request, or undertaking, on the part of an infant, unless it appears that the sale or purchase will be for his benefit.

Difficulties where parties out of jurisdiction.

Considerable difficulty also arose under the Act of 1868, where persons were out of the jurisdiction, it having been held that no sale could be ordered unless every person interested in the property, the subject of the partition suit, was either a party to the cause, or had been served with notice of the decree. In order to remedy these defects, the Partition Act 1876[2] provides that, if it appears that notice of the judgment cannot be served on all persons interested, or cannot be so served without disproportionate expense, the Court, on request of any party, and even if others dissent, may dispense with such service, and, instead, direct advertisements to be issued calling on persons to come in and establish their claims within a certain time; and that, after the expiration of such time, such persons, whether within or without the jurisdiction, and including persons under disability, shall be bound by the proceedings, and that the Court may thereupon, if it thinks fit, direct a sale of the property. Where, in accordance with this provision, a sale is made, the Act provides that the proceeds of the sale are to be

Provision hereon of Partition Act 1876.

[1] 39 & 40 Vict., c. 17, sec. 6.
[2] Sec. 3.

paid into Court; and that the Court shall fix a time when such proceeds will be distributed, and shall direct notice thereof to be given by advertisement or otherwise, and then, if the interests of all parties have been ascertained, the Court shall distribute the proceeds. If such interests have not all been ascertained, and cannot be, or at least without disproportionate expense, it is provided that the Court shall distribute the proceeds in such manner as appears most in accordance with the rights of the parties whose claims have been established, and with such reservations as may seem fit in favour of other persons who may appear to the Court to have *primâ facie* rights, but to the exclusion of all other persons; but, notwithstanding the distribution, any excluded person may recover from any participating person what has been received by him of the share of such excluded person.

Sale may be directed to take place out of Court.

Where, in a partition action, a sale is ordered, such sale usually takes place under the Court's directions in the ordinary manner; but it is now provided that the Court, or a judge, shall have power to authorise the same to be carried out by proceedings out of Court, any moneys produced thereby being paid into Court, or to trustees, or otherwise dealt with as may be ordered. It is, however, also provided that the judge shall not authorise the proceedings altogether out of Court, unless and until he is satisfied by such evidence as he shall deem sufficient, that all persons interested in the property are before the Court, or are bound by the order for sale, and any order authorising a sale out of Court must be prefaced by a declaration that the judge is so satisfied, and a statement of the evidence upon which such declaration is made.[1]

[1] Order LXI., rule 1a.

Costs of partition suits.

The costs of a partition suit are in the discretion of the Court, and the old rule was that the entire costs should be borne by the parties in proportion to their interests, as declared by the judgment in the action. But the present settled practice is to allow the costs of all necessary parties to an action for partition or sale, out of the entire estate or the entire proceeds of sale, on the principle that such costs properly incurred are for the benefit of all. The costs as to each share thus come out of the estate except where there are any special circumstances, arising from the conduct of any of the parties, which may lead the Court to apportion the costs otherwise.[1]

Settlement of boundaries.

Not altogether unconnected with the subject of partition, is that of settlement of boundaries, a matter which, not being of sufficient importance to be considered by itself in a work like the present, may conveniently be shortly referred to here.

The origin of the jurisdiction.

Ordinarily, if there is a dispute between two proprietors as to their boundaries, the law affords a remedy by an action of trespass or of ejectment. But, in very ancient times the Court of Chancery assumed a jurisdiction in certain cases to actually enquire into the boundaries, by issuing a commission upon the subject. It has been supposed that the origin of the jurisdiction of the Court of Chancery in such matters was the consent of the parties, and, again, that its origin was the prevention of multiplicity of suits. But, whatever may have been the origin of the jurisdiction, it is certainly at the present day of a very limited character; for the general rule now is, that the Court will not entertain jurisdiction merely upon the ground that the

Limited extent of the jurisdiction now.

[1] 1 Wh. & Tu., 216, 217. See further as to Partition, *Agar* v. *Fairfax* and Notes in 1 Wh. & Tu., 181.

boundaries are in controversy, but will require that there should be some equity superinduced by the act of the parties, such as some particular circumstances of fraud, or some confusion through one person ploughing too near another, or some gross negligence, omission, or misconduct, on the part of a person whose special duty it was to preserve or perpetuate the boundaries.[1] If a lessee has not kept lands of his own distinct from those demised to him, the Court will give relief in this way, either during the continuance of the term, or after it has expired.[2]

Settling boundaries when many persons interested.

And, in addition to what has been stated, the Court will entertain an action to settle boundaries where it will prevent a multiplicity of suits,[3] *e.g.*, where the right affects a number of persons, such as a common right in lands.

Modern practice in action to settle boundaries.

Where the Court entertains a suit to settle boundaries, the modern practice, instead of issuing a commission, as formerly, is to refer the matter to chambers, to ascertain the boundaries, and, when this is done, to subsequently dispose of the matter by a hearing on further consideration.[4]

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[1] Story, 402-408; *Wake* v. *Conyers*, 1 Wh. & Tu., 170.
[2] *Spike* v. *Harding*, 7 Ch. D., 871; 47 L. J., Ch., 323; *Attorney General* v. *Fullerton*, 2 V. & B., 264.
[3] *Wake* v. *Conyers*, 1 Wh. & Tu., 170.
Spike v. *Harding*, 7 Ch. D., 871; 47 L. J., Ch., 323.

PART III.

OF SOME PARTICULAR DOCTRINES AND MATTERS, WHICH, HAVING HAD THEIR ORIGIN IN EQUITY, ARE STILL MOST USUALLY PROPER SUBJECTS FOR CONSIDERATION IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE.

CHAPTER I.

ELECTION.

Definition, and reason of doctrine.

THE doctrine of Election may be defined as the obligation imposed upon a party to choose between two inconsistent, or alternative, rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both. Every case of election, therefore, pre-supposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy both benefits.[1] The reason or ground for the doctrine is that substantial justice may be done, which was impossible at Common Law, for there if A bequeathed to B £1,000 and gave to C a house belonging to B, B could not be made to give up his house, and yet he would take the £1,000, unless, indeed, the two gifts were so necessarily connected as to make the giving up of the house a condition to the taking of the £1,000.[2] The necessity for such a doctrine as

[1] Story, 732.
[2] Note to *Gretton* v. *Haward*, 1 Swanst., 425.

election in Equity must, therefore, be evident, for, in the case just put, it is clear the testator did not mean B to have £1,000 and still retain his house, and it is, therefore, correct to say that the foundation of the doctrine is the intention of the author of the instrument.

Noys v. *Mordaunt.*

The leading case of *Noys* v. *Mordaunt*[1] furnishes us with a practical, and easily understood, instance of election. There a testator, being possessed of fee simple and fee tail properties, and having two daughters, devised the fee tail property to one entirely, and the fee simple property, and certain money, to the other. This other contended that her father had no power to thus deprive her of her share in the entailed property, and claimed to have her share therein, as well as the benefits which she took under the will. The Court held that she must elect between the two, for it was evident she was not meant by her father to take the benefits he had conferred on her, and, at the same time, dispute his other devise, and, in giving judgment, Lord Cowper said :— "In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other."

Election occurs whether party knew property not to be his own, or thought it was his own.

This, therefore, shows us plainly the first elementary idea of the doctrine. But the question then presents itself, whether there is any difference with regard to the doctrine if a testator knows he is giving away what he has no power to so deal with in a direct manner, or if he gives away the property under the notion that it is his and that he can do what he likes with it. The answer to this question

[1] 1 Wh. & Tu., 414.

is, that there is no difference in the position; it is quite sufficient that the testator does dispose of property which in fact is not his own, without any enquiry whether he did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own.[1]

Where the doctrine will not apply.

For the doctrine to apply, however, it must clearly appear, from the words made use of in the will, that the testator meant to dispose of property which he was not entitled to, and parol evidence will not be admitted on the point.[2] In one case a testator bequeathed certain leasehold houses, and the interest of all his funded property, upon trust for his wife for life, and after her death upon trust to pay divers legacies. At the date of his will he had no funded property except some that was standing in the joint names of himself and his wife, and which, therefore, his wife would take by survivorship. It was here contended that, as the wife took benefits by the will, a case of election was raised as regards this funded property; but the Court held that the doctrine did not apply, because there was nothing on the face of the will to show that the testator was dealing with his wife's property, for he might very well have acquired funded property some time before his death, and no parol evidence on the point could be received.[3] Generally, it may be stated that if it is possible to put a construction on a will, which appears to carry out the testator's intention without raising a case of election, this will be done. Therefore, the doctrine of election has been held not to be applicable to cases where the testator has some present interest in the estate disposed of by him, although it is not entirely his own,[4] for it is

Dummer v. *Pitcher*.

[1] Story, 747, 748.
[2] *Clements* v. *Gand*, 1 Keen, 309; and see 1 Wh. & Tu., 425, 428.
[3] *Dummer* v. *Pitcher*, 2 My. & K., 262.
[4] Story, 445, 746.

surely more reasonable to presume that he was dealing with what was his own, rather than with what was not. Thus, if a testator has a reversion in Whiteacre, and he professes to devise Whiteacre, and by his will he also gives a benefit to the tenant for life of Whiteacre, here ordinarily no case of election arises, for, *primâ facie*, he is to be deemed only to refer to what he had power to dispose of, viz., the reversion in Whiteacre. However, a contrary intention may appear so as to raise a case of election, as if Whiteacre is devised upon limitations which, were the testator's own interest only to pass, could not, or probably would not, ever take effect.[1]

Compensation is the doctrine, not forfeiture.

The case of *Noys* v. *Mordaunt*, to which reference has been made, though supplying us with the general idea of the doctrine of election, does not inform us what is the result of the person, whose property is given away, electing against the instrument, that is to say, refusing to give up his own property. The leading case of *Streatfield* v. *Streatfield*,[2] however, informs us upon this point, that being a distinct authority to the effect that such person does not necessarily forfeit the whole benefit given to him, but only so much thereof as will compensate the person who is disappointed of his benefit by reason of the other's election not to give up his property—in other words, compensation, and not forfeiture, is the rule. This point has been the subject in former times of much controversy, but is now well settled.[3] Thus, to take a simple instance—A gives to B £1,000, and gives to C a cottage, the property of B, worth say £300. B elects against the instrument, that is, he declines to give up his cottage; but still he will get

Streatfield v. *Streatfield.*

Example.

[1] 1 Wh. & Tu., 427.
[2] *Ibid.*, 416.
[3] *Ibid.*, 422; Story, 740, 741.

£700 of the legacy, for the Court only assumes jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to the person whom his election disappoints, and the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal rights.[1]

Election in the case of appointments under special powers.

As then the doctrine of election depends upon compensation, it follows that it will not be applicable when made contrary to the instrument, unless there is a free and disposable fund passing thereby, from which compensation can be made.[2] Thus, suppose a person has a special power of appointment, and he appoints part of the fund to objects of the power, who would also, under the terms of the instrument conferring the power, take the property in default of appointment if no appointment were made, and he also appoints the residue of the fund to persons not objects of the power. Here the objects of the power to whom the appointment has been made may set the excessive appointment aside, and claim the amount thereby appointed as coming to them in default of appointment. At the same time they are also entitled to take the specific shares appointed to them, for here no part of the testator's own property is comprised in the gifts, but only that which he had a power to distribute.[3] But where a person has a special power of appointment, and appoints to a person who is not an object of the power, and by the same instrument gives property of his own to the person entitled in default of appointment, the latter cannot take this benefit and at the same time insist that there has been no appointment, and that

Bristow v. *Ward.*

Whistler v. *Webster.*

[1] See Note to *Gretton* v. *Haward*, 1 Swanst., 433.
[2] 1 Wh. & Tu., 423.
[3] *Bristow* v. *Ward*, 2 Ves., Jun., 336.

he therefore takes in default, but he will be put to his election.[1] And where the donee of a power makes a valid and irrevocable appointment, and then by another instrument professes to revoke it, and to appoint to some other person, giving by the same instrument a benefit to the former appointee, the latter will be put to his election.[2] And the doctrine of election is applicable equally where an appointment by will under a special power is void because the appointment is void by the perpetuity rule, or because it is not made to an object of the power, so long as the will gives free disposable property belonging to the testator to the person who takes in default of appointment.[3]

Election may arise in deeds as well as in wills.

The doctrine of election is applicable to deeds as well as to wills, but with regard to deeds a question of election of a different kind to that applicable to wills may occur, viz., cases of election without there being, as in the case of wills, a clear intention on the part of the settlor to dispose of property which was not his own.[4] For, in the case of a deed which confers a benefit on a person who, at the same time, incurs a liability, such person cannot possibly be allowed to reject the liability as for some reason not binding, and, at the same time, accept the benefit, *i.e.*, he cannot "approbate and reprobate" under the same instrument.[5] Thus, if an infant woman makes a marriage settlement not under the provisions of the Infants Settlement Act 1855,[6] and in it she covenants to settle after-acquired property, and she takes also benefits from her husband under such settlement, here although the covenant

Covenant by infant in marriage settlement.

[1] *Whistler* v. *Webster*, 2 Ves., 367.
[2] *Cooper* v. *Cooper*, L. R., 7 H. L., 53; 44 L. J., Ch., 6.
[3] *Re Bradshaw* (1902), 1 Ch., 436; 71 L.J., Ch., 230; 86 L.T., 253.
[4] 1 Wh. & Tu., 431.
[5] *Brown* v. *Brown*, L. R., 2 Eq., 481.
[6] 18 & 19 Vict., c. 43. See *ante*, p. 325.

will not bind her, by reason of her infancy, yet she will not be allowed to repudiate the covenant, and, at the same time, take the benefits conferred upon her by the settlement.[1] But this doctrine does not apply where the only benefit she takes in her husband's property under the settlement is a life interest settled on her without power of anticipation, because the effect of decreeing that she must give up the life interest, or rather give compensation out of it, would be to deprive her of that income which the settlement said should not be anticipated by any act or omission of hers. The doctrine of election, in fact, depends on intention, and an instrument which settles property on the wife, without power of anticipation, substantially contains a declaration of a particular intention which is inconsistent with, and excludes, the doctrine of election.[2] In the case of *Re Vardon's Trusts*, referred to below, a settlement had been made on the marriage of an infant woman, without the sanction of the Court under the Infants Settlement Act 1855. By it £5,000 was settled on her by her husband for her separate use, without power of anticipation, and she covenanted to settle all her after-acquired property upon certain trusts under which her husband would benefit. Afterwards, a sum of £8,000 was bequeathed to the married woman for her separate use, and she refused to settle it, and she also claimed to go on receiving her life interest in the £5,000. It was held by the Court of Appeal that she could do so.[3]

Re Vardon's Trusts.

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[1] *Willoughby* v. *Middleton*, 2 J. & H., 344; 31 L. J., Ch., 683.

[2] *Re Vardon's Trusts*, 31 Ch. D., 275; 55 L. J., Ch., 259; Brett's Eq. Cas., 309.

[3] It may be remarked that, by reason of this, the covenant to settle after-acquired property should not be by the infant woman alone, but by her and her husband, and then, by reason of section 19 of the Married Women's Property Act 1882, it will generally be effectual (*Stevens* v. *Trevor-Garrick* (1893), 2 Ch., 307; 62 L. J., Ch., 660 69 L. T., 11. See Indermaur & Thwaites' Conveyancing, 492-495).

If two distinct gifts to a person, he may take one, and reject the other.

But, although ordinarily a person who takes a benefit under a deed by which he incurs a liability, cannot avoid the liability, and yet take the benefit, that principle has nothing whatever to do with the point of there being two separate gifts to a person, and he desiring to take one and to reject the other. There is nothing to prevent this, for there is no case of election raised compelling the beneficiary to take all or nothing, unless there are words used which show that the taking of the one gift was conditional upon the donee taking the other also.[1] Thus, if a testator devises a freehold estate to A, and then goes on also to bequeath him a leasehold house which is worthless, and burdened with a heavy rent and onerous covenants, here A may take the freehold estate and disclaim the leasehold house.

Express election.

Assuming that a person is bound to elect, the next question to be considered is what will amount to an election? Of course it is most satisfactory to be able to show an express election, as by the devisee or legatee executing a deed expressing that he elects and confirming his own property to the other party concerned. This is conclusive, unless the election has been made under a mistaken impression; and as persons compelled to elect are entitled previously to ascertain the relative values of their own property and of that conferred upon them, it follows that if a person elects upon wrong information as to value, such election will not always be binding on him. It does not, however, necessarily follow that a deliberate election must be bad because the person electing did not know all the facts; for if he has chosen to so voluntarily elect, it would often be

[1] *Andrew* v. *Trinity Hall*, 9 Ves., 525; *Aston* v. *Wood*, 43 L. J., Ch., 715.

doing injustice to allow him to repudiate what he has done.[1]

Implied election.

But beyond an express election, there may be many acts and circumstances which may be deemed an election, or which, in other words, raise a case of implied election; and here considerable difficulty often arises in deciding whether particular acts and circumstances do or do not amount to election. This is a matter to be determined chiefly on the facts of every particular case, but it is still capable of being dealt with, to a certain extent, upon general principles. Four such general principles may be laid down, viz.: (1) That the party must be capable of electing; (2) That he must have known of the existence of the doctrine of election; (3) That he was aware of all facts necessary to enable him to properly elect; and (4) That, notwithstanding the two last principles, the Court will hold a person to what he has done if it would be inequitable to disturb the position of things.

Four principles.

Explanation of these four principles.

By the first principle above mentioned is, of course, meant that a person under disability cannot elect, a matter presently further considered. The second principle seems reasonable, for though it is a rule that *Ignorantia legis neminem excusat*,[2] yet the doctrine of election is not in the nature of a positive rule of law, which a person is bound to know; and as a case of implied election arises from what is presumed to be intended, it would be impossible to arrive at a conclusion of intention if the party did not know of his rights.[3] By the third principle is simply meant that the person is entitled, previously to electing, to ascertain the relative values of the

[1] *Dewar* v. *Maitland*, L. R., 2 Eq., 834.
[2] See *ante*, pp. 232, 237.
[3] *Spread* v. *Morgan*, 11 H. L. Ca., 588.

properties, so as to determine his best course, and that, in the absence of such knowledge, an intention to elect cannot be presumed. But, notwithstanding this, if the person entitled to elect lets another so deal with one of the properties that it would be inequitable to disturb its possessor, then he will be estopped from doing so.[1] Thus, if Whiteacre is given to A, and Blackacre, which belongs to A, is given to B, and A, without taking any trouble to ascertain the relative values of the properties, allows B to take possession of Blackacre, and then settle it on his marriage, here it would be inequitable to disturb the rights thus acquired. And, generally, upon the principle of not entertaining stale demands, where there has been a very considerable lapse of time, the Court will not entertain a claim to disturb another in his possession of property by reason of the doctrine of election.[2]

Acts not amounting to election.

If a person on whom a duty to elect rests, and who has not been specially called upon to elect, continues in receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other. In like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, *e.g.*, by mortgaging it, such dealing will be unavailable to prove an actual election, as against the receipt of the rent of the other property.[3]

Effect of person entitled to elect dying without making election.

If a person who is entitled to elect, dies without having elected, then, if both properties devolve on the same person, such person must elect.[4] If such

[1] *Dewar* v. *Maitland*, L. R., 2 Eq., 834.
[2] Story, 750, 751.
[3] 1 Wh. & Tu., 440.
[4] *Fytche* v. *Fytche*, L. R., 7 Eq., 409

properties, however, respectively go to different persons, then there is no case of election, but the person taking the property the devise or bequest of which put upon the deceased the obligation of electing must thereout compensate the other beneficiary.[1] Thus, say a freehold house is devised by X to A, and X also devises to B a freehold house belonging to A, and A dies without having elected, here his heir or general devisee will be bound to elect, as both properties devolve on him. But suppose X devises a freehold estate (Whiteacre) to A, and bequeaths to B a leasehold property of A's, known as Blackacre. A has, however, already made his will, and by it has given Blackacre to C, and say that such will contains a residuary devise in favour of D. Now, take it A dies without making any election. It is manifest that Blackacre goes to C, and no one can prevent him taking it. What, then, is D's position? Does he take Whiteacre under the residuary devise? Certainly, if he likes to, but if he does so take it he must pay to B the value of Blackacre, and Whiteacre will, in his hands, be charged to that extent. This is not election; it merely follows as a matter of plain principle that D has nothing to complain of, for the very instrument (X's will) which gives him the benefit of Whiteacre, gives him the benefit burdened with the obligation. Or, again, suppose in the above case that A had died intestate. Then, of course, his leasehold property (Blackacre) must go to his next-of-kin, and, as regards A's heir, if he chooses to take Whiteacre he will take it charged with the payment to B of the value of Blackacre.[2]

Examples.

With regard to persons under disability, it is far too wide a proposition to lay down generally, that such persons cannot elect. Thus, with regard to

Election in the case of persons under disability

[1] *Pickergill* v. *Rodger*, 5 Ch. D., 163.
[2] 1 Wh. & Tu., 445.

Married women.

married women, although the ordinary practice has been to direct an inquiry as to which is most for the benefit of the married woman, and then to require her to elect within a limited time, yet in some cases the Court has at once elected for her, seeing what was manifestly for her interest.[1] However, though this is the ordinary practice of the Court, it has been decided that a married woman can elect by herself, and, even as to realty, without any deed acknowledged, upon the principle that to hold otherwise might be to permit her to commit a fraud.[2] And, of course, this would *à fortiori* be so now since the Married Women's Property Act 1882[3]; but, probably, this Statute has not altered the general practice of the Court with regard to acting in the case of a married woman who has not already elected, by directing an inquiry as just mentioned.

Robinson v. *Wheelwright.*

But where, to enable a married woman to take property given to her, it would have been necessary for her to have given up property settled upon her for her separate use without power of anticipation, the Court refused to aid her, although it was manifestly for her benefit to do so, considering itself precluded from doing so by reason of the anticipation clause.[4]

Conveyancing Act 1881, sec. 39.

It is, however, now provided by the Conveyancing Act 1881[5] that, notwithstanding a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

Infants.

With regard to infants, although an infant cannot elect, yet the Court can elect for him, and this power

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[1] 1 Wh. & Tu., 443.
[2] *Barrow* v. *Barrow*, 4 K. & J., 409; *Wilder* v. *Piggott*, 22 Ch. D., 263; 52 L. J., Ch., 141; 48 L. T., 112.
[3] 45 & 46 Vict., c. 75.
[4] *Robinson* v. *Wheelwright*, 6 De G. M. & G., 535.
[5] 44 & 45 Vict., c. 41, sec. 39.

the Court will at once exercise if it is manifest which course is most for the infant's benefit[1]; but, if it is not so manifest, the Court will direct an inquiry to be made in chambers as to which is most beneficial, and will then elect for the infant in accordance with the result of such inquiry.[2] But, in some cases where there is no occasion for an immediate election, the Court will postpone the election until the infant attains twenty-one, so that he can then himself determine the matter.[3]

Lunatics.

The Lunacy Court has inherent jurisdiction to elect for a lunatic; and the ordinary practice is to direct an inquiry to be made in chambers as to what is most beneficial, and the Court will then elect for him, in accordance with the result of such inquiry. In considering what is for the benefit of the lunatic in such a case, the Court should not merely look at his pecuniary benefit, but act for him as if he were of sound mind and actuated by such motives as would influence a reasonable man.[4]

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[1] *Blunt* v. *Lack*, 22 L. J., Ch., 148; *Re Montagu*, *Faber* v. *Montagu* (1896), 1 Ch., 549; 65 L. J., Ch., 372; 74 L. T., 346, in which case the Court at once made the election. The form of the order made is given in 65 L. J., Ch., 374.

[2] *Brown* v. *Brown*, L. R., 2 Eq., 481.

[3] *Streatfield* v. *Streatfield*, 1 Wh. & Tu., 416.

[4] *Re Earl Sefton* (1898), 2 Ch., 378; 67 L. J., Ch., 518; 78 L. T., 765.

CHAPTER II.

SATISFACTION AND PERFORMANCE.

Definition of Satisfaction.

SATISFACTION in Equity may be defined as the making of a donation with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee.[1]

Definition of Performance.

Performance may be defined simply as the doing of a thing agreed to be done. Both doctrines would seem to have as their basis the maxim, "Equity imputes an intention to fulfil an obligation." Particularly is this seen in the doctrine of performance, for, where a man is under an obligation to do a thing, and he does something, it is only reasonable to presume, if possible, that the something which he does, bearing some resemblance to his obligation, is, indeed, the very thing itself. So also with satisfaction, the argument is that it is reasonable to presume that, although a person does something other than what he was under an obligation to do, yet he meant it to be instead of his obligation, although he has not said so.

Distinction between satisfaction and performance.

The great distinction between the two doctrines is, that satisfaction is a substitution, whilst performance is the doing of the very thing itself; and we have to consider, firstly, when an act done will operate in satisfaction of another, and, secondly, when an act done which is not manifestly a performance of an obligation, is yet so construed by the Court.

Cases of express satisfaction.

Where a person in so many words plainly says that something which he does is instead of something else, no one can question the justice of the doctrine; it would be absurd to let a person take

[1] Story, 751.

both benefits, and the subsequent one must, therefore, if taken, extinguish the former obligation either entirely or in part. But, though nothing of this kind is said, the Court presumes such an intention in certain cases, mainly upon the principle that a man shall be presumed to be just before he is generous. It is somewhat difficult to vindicate the justice of the doctrine to the extent to which, as will be presently pointed out, it exists, for surely a will imports a bounty, and it is difficult to logically arrive at the conclusion that it is not so meant. In fact, the whole doctrine of presumed satisfaction stands more by the force of decisions which cannot be now shaken than by the strength of an original basis of sound principle.[1]

Presumed satisfaction.

Cases of presumed satisfaction may be divided into two wide classes, viz.: (1) Satisfaction arising in the case of a portion to a child, or one towards whom the donor stood in *loco parentis*, followed by some subsequent benefit; and (2) Satisfaction arising in the case of a legacy given to a creditor.

Two wide classes of presumed satisfaction.

Firstly, as regards portions. A portion is a provision made for a child by a parent, or one occupying that position, of a sum of money or other property, of such an amount that it would reasonably be presumed to have been intended to have been given to establish the child in life. In all the reported cases, the parent referred to is the father; and the burden of proving that the duty of providing for a child falls on, or has been assumed by, the mother rests on those who assert it.[2] Any person, including the mother, can assume the office of a father for this purpose.[2] A person not occupying

Satisfaction in the case of portions.

[1] Story, 751, 752.

[2] *Re Ashton, Ingram* v. *Papillon* (1897), 2 Ch., 574; 66 L.J., Ch., 731; 77 L. T., 49.

What is putting oneself in *loco parentis*.

the actual position of a father may yet take upon himself a father's duties by substantially adopting a child, and he is then said to put himself in *loco parentis;* and he may do this even although the actual father is living. A person putting himself in *loco parentis* may be described as a person who, by the way in which he has acted, may fairly be said to have meant to put himself in the situation of the father with reference to the office and duty of such father to make provision for the child.[1] The case of *Powys* v. *Mansfield*[2] is peculiarly illustrative of this. There the father of two daughters had a wealthy brother who practically controlled the family, the father, by the desire of his brother, residing near him, and maintaining, with his brother's assistance, a more expensive establishment than he could, unaided, have afforded. The brother took great interest in his nieces, treating them as his own daughters, making them presents, giving them pocket-money, allowing them to use his horses and carriages, frequently having them to stay at his house, and personally interesting himself in their tuition, and in their marriages, as a father would have done. The Court held that, although the father of the young ladies was living, their uncle had, nevertheless, placed himself in *loco parentis* towards them.

Powys v. *Mansfield.*

Illegitimate child.

An illegitimate child is looked upon by the Court as a stranger, and no presumption of satisfaction arises with regard to him, unless there are circumstances to show that the donor intended to place himself in *loco parentis* towards him.[3]

[1] Per Lord Eldon, in *Ex parte Pye*, 2 Wh. & Tu., 366.

[2] 6 Sim., 644.

[3] *Ex parte Pye*, 2 Wh. & Tu., 366; see, however, *Re Lawes, Lawes* v. *Lawes*, 20 Ch. D., 86; 45 L. T., 480, in which case Sir G. Jessel, M.R., appears to have considered that, from the mere fact of the testator being the putative father, he stood in *loco parentis* towards his natural son; but it was not necessary for the purposes of that case to decide this point, and at most this can only be taken as an extra-judicial opinion.

Gifts to children looked at as portions.

Using then the word parent as expressing not only a lawful father, but also any person (including the mother) who has placed himself in *loco parentis*, there is an obligation of a moral kind cast upon the parent to provide for his child; and therefore, when a benefit is given to a child, the Court always takes it that the father is paying a debt of nature, and looks at the benefit given in the light of a portion, whether it be by settlement or will, or by an advancement on some appropriate occasion, *e.g.*, marriage.[1] Then the Court goes a step further, and says that the father is the best judge of what is the proper provision or portion for his child; and that when, by settlement or will, he has fixed the amount, though he has not yet actually handed it over, it is not to be taken, if he afterwards confers some other benefit upon the same child, that that is in addition to the former provision, but rather on account or in extinguishment of it.[2] In other words, he is not supposed to be adding to what he has fixed as the portion, and which at present remains an unfulfilled obligation, but to be endeavouring to satisfy such obligation. The Court, therefore, leans against double portions and in favour of satisfaction, and a result is produced which, though to some extent justified by this somewhat artificial reasoning, yet undoubtedly may operate very harshly towards children, especially when contrasted with gifts to others. Thus, suppose A gives, by his will, to his son £5,000, and to his nephew (towards whom he has never placed himself in *loco parentis*) a like sum, and both subsequently marry, and then A gives each of them £5,000 on his marriage day. On A's death the son will get nothing under the will, but the nephew will still get £5,000. The argument is that in the

Example hereon, as contrasted with gifts to others.

[1] *Ex parte Pye*, 2 Wh. & Tu., 366.
[2] *Ibid.*

case of a nephew, or, indeed, in the case of anyone not occupying the position of an actual or adopted child, there is no moral duty to provide for such person, and, therefore, there is no obligation to discharge, and the benefits are separate spontaneous gifts; whilst in the case of the child there is the obligation, and it is presumed that the desire is to satisfy that obligation.

Advancement.

An advancement by way of portion[1] denotes any sum of money given by a parent to establish his child in life, or to make a provision for him, *e.g.*, a settlement on marriage, or the expense of putting him into a profession or business, buying him goodwill or stock-in-trade, or the gift of any considerable lump sum; and it *primâ facie* adeems *pro tanto* any provision made for that child in a previously executed will, and it must also be brought into hotchpot on dividing personalty between children under their father's intestacy. Of course, when a person first makes an actual advancement to a child, and then afterwards makes a provision by settlement, or by will, no point of satisfaction can arise, because the first amount has been actually paid over, and anything else must naturally be in addition to that, for there is no longer outstanding any recognised unfulfilled obligation. But where there is a settlement first, under which the obligation exists by reason of some covenant therein, and then there is a provision by will or an advancement is made, or where there is a will first, and then there is a provision by settlement or an advancement is made, the doctrine applies. And there is substantially no difference whether the

Satisfaction arises equally whether first a settlement or a will.

No substantial difference.

[1] *Taylor* v. *Taylor*, L. R., 20 Eq., 155; 44 L. J., Ch., 718; *Re Scott*, *Langton* v. *Scott* (1903), 1 Ch., 1; 72 L. J., Ch., 20; 87 L. T., 574. Small gifts, money for education, or an annual allowance for maintenance, are not an advancement or portion. (*Ibid.*)

settlement containing the covenant comes first, or the will. It was, however, at one time thought that there was a difference, in that if the will came first and then the settlement or advancement, the will being a revocable instrument, the subsequent benefit, though of less amount, might entirely extinguish the legacy [1]; whilst it could only be an extinguishment in part if the settlement containing the covenant came first, because there was an actual right acquired under the settlement. But it is now clearly decided that in all cases where the second sum given is less than the first, it can but operate as a satisfaction *pro tanto*.[2] There is, however, some little difference in the technical working out of the matter, for if the first provision is by will, then the subsequent advancement, or settlement, takes away that money which would have passed under the will, and to that extent the will is inoperative; but if the first provision is by a covenant in a settlement, and then there is an advancement or bequest, the child must here elect. Naturally, if the legacy is greater, he elects to take that, and thus the obligation under the settlement is entirely extinguished; but, if smaller, then he pays no attention to the will, but takes what he is entitled to by reason of the covenant in the settlement.

But there is a technical difference.

From this technical distinction arises also a difference in name, whilst the doctrines are in substance and idea identical. When the covenant to settle comes first, and then the will or advancement, this is said to be satisfaction properly so called; but if the will comes first, and the actual settlement or advancement follows, then it is styled ademption. This is by analogy to the ademption of

When the doctrine of satisfaction is styled ademption.

[1] See *Ex parte Pye*, 2 Wh. & Tu., 366.
[2] *Pym* v. *Lockyer*, 5 My. & Cr., 29.

a specific bequest,[1] and the idea of so styling it is, that the money which would have passed under the will has been taken out of the scope of the will, and is in substance not existing to pass under it at the date of the testator's death. There is in effect, however, no difference between the two cases, beyond the verbal difference of styling the doctrine satisfaction in the one case, and ademption in the other—the principles applied to the two cases are the same.[2]

The Court leans against double portions.

It must be clearly understood that the doctrine of satisfaction or ademption, in the case of portions to children, is carried to a great length, for, as has been already said, the Court leans in favour of there being a satisfaction, or ademption, and against double portions, so that though there may be slight circumstances of difference, yet the doctrine will generally prevail. The Court, it has been said, does not weigh in golden scales the provisions that have been made, and does not determine against the doctrine merely because the two benefits differ in amount. A difference in amount has never been held sufficient proof of intention to make double provisions, and it has been distinctly held that the circumstance of the sums being payable at different times, and other differences, so that they be slight, will not prevail over the general presumption against double portions.[3]

Kirk v. *Eddowes.*

In accordance with this principle, it has been held that a bequest made to a daughter for life, with remainder to her children, was adeemed by a gift made *inter vivos* to the daughter and her husband.[4]

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[1] See *ante*, p. 134.

[2] Per V.C. Wood, in *Coventry* v. *Chichester*, 2 H. & M., 158.

[3] *Wharton* v. *Earl of Durham*, 3 Myl. & K., 479; *Stevenson* v. *Mason*, L. R., 17 Eq., 84. See also *Re Lawes*, *Lawes* v. *Lawes*, 20 Ch. D., 81; 45 L. T., 480; *Re Furness*, *Furness* v. *Stalkartt* (1901), 2 Ch., 346; 70 L. J., Ch., 580; 84 L. T., 680.

[4] *Kirk* v. *Eddowes*, 3 Hare, 509.

And, again, it was held that a sum given to a daughter's husband in consideration of his making, on his marriage, a settlement upon her and her children, operated as an ademption of a legacy to the daughter.[1] And, although a contrary opinion formerly prevailed, it has now been decided that if there is a sum of money by way of a portion, covenanted by a settlement to be paid to a child, and afterwards there is a will made containing a bequest of residue to the same child, this does operate as a satisfaction entirely or *pro tanto*, and the child will not be allowed to take first the portion, and then the residue.[2] As regards the converse position of a will containing a residuary gift to a child being made first, and afterwards a subsequent portion given or settled, it has been held that though there may here be an ademption, it does not necessarily so follow, for it is a question of intention; but that it does not depend upon the mere uncertainty of the residue, or upon slight differences between the trusts of the residue and the trusts of the settlement.[3] All these instances clearly go to show that the Court leans in favour of the doctrine of satisfaction or ademption and against double portions, for the discrepancies appearing in each case would naturally give opportunity to the Court to say there was no satisfaction or ademption, if it chose to do so, and yet we find the Court generally holding that the doctrine does apply, and that satisfaction or ademption takes place.

Satisfaction by gift of residue.

Thynne v. *Earl of Glengall.*

But where there are really substantial differences between two provisions, no satisfaction will take

Cases of no satisfaction.

[1] *Durham* v. *Wharton*, 3 C. & F., 146.

[2] *Thynne* v. *Earl of Glengall*, 2 H. L. Ca., 131. See also *Re Battersby's Estate*, 19 L. R., Ir., 359.

[3] *Montefiore* v. *Guedella*, 6 Mer., N. S., 29; 1 De G., F. & J., 93; *Cooper* v. *Macdonald*, 16 Eq., 258; 42 L. J., Ch., 533.

Chichester v. *Coventry.*

place. Thus by an indenture of settlement on the marriage of one of his two daughters, B covenanted to pay to the trustees of the deed £10,000 upon terms which conferred a direct benefit on the husband. Also by his will, made after the settlement, B gave to trustees all his property upon trust, after payment of debts, for division between his two daughters in equal shares, but so that their respective husbands should not take any benefit thereunder. It was held that the gift by the will was not a satisfaction of the covenant, and that the sum of £10,000 under the settlement must be paid out of the property before the division of the residue into equal moieties took place.[1] In

✓ *Re Tussaud.*

another case, a father covenanted with trustees, on the marriage of his daughter, that his executors should transfer to the trustees £2,000 consols to be held upon trust for such persons as his daughter should, with the consent of the trustees, appoint, and in default of appointment upon trust for the daughter for life, then for the husband for life, then for the children of the marriage, and then, in default of children, for the husband absolutely. The father died without having fully performed his covenant, and having subsequently to the settlement made his will, whereby he bequeathed a greater sum to trustees upon trust for his daughter for life for her separate use, without power of anticipation, and after her death for her children by any marriage, and, in default of any such children, the fund was to fall into the residue of his estate and go to his own son. It was held, that there were such substantial differences between the provisions of the settlement and the will, that the presumption against double portions was rebutted, and that the covenant must be fully performed, and the money bequeathed by

[1] *Chichester* v. *Coventry*, L. R., 2 H. L., 95; 36 L. J., Ch., 673.

the will duly paid.[1] On the same principle of substantial difference, it has been held that a legacy to a daughter was not adeemed by a simple gift to the daughter's husband after marriage.[2] And a legacy to a child is not adeemed by occasional small gifts made by the testator in his lifetime, nor by a sum of money simply given to the child for a wedding outfit or for the wedding trip.[3]

Evidence to rebut satisfaction.

But it must be remembered that the whole doctrine which we are considering is but a presumption of Equity, based on what the Court considers the probable intention of the father, or other person standing in *loco parentis*; and such presumption is liable to be rebutted by any indication of a contrary intention appearing in the instrument conferring the benefit, and on which the question arises, or even by extrinsic evidence. Thus, if a father having made a settlement containing a covenant to provide a sum by way of a portion for his child, subsequently makes his will in which, after reciting the settlement, he expresses a desire to make further provision for the same child, and then gives that child a legacy, it could not be suggested that there was any satisfaction, for there is an express indication of a contrary intention. And, even without any such express indication, the circumstances may be such as to amount to intrinsic evidence against satisfaction, *e.g.*, where the portion is vested, and the subsequent legacy is contingent.[4] A difference in kind does prevent the rule against double portions applying, for the two gifts must be *ejusdem generis*,[5]

Intrinsic evidence.

Re Jaques.

[1] *Re Tussaud's Estate, Tussaud* v. *Tussaud*, 9 Ch. D., 363; 47 L. J., Ch., 849; Brett's Eq. Cas., 316.
[2] *Ravenscroft* v. *Jones*, 32 Beav., 669.
[3] *Ibid.*; Story, 762.
[4] *Bellasis* v. *Uthwait*, 1 Atk., 426.
[5] *Re Jaques, Hodgson* v. *Braisby* (1903), 1 Ch., 267; 72 L. J., Ch., 197; 88 L. T., 210.

thus the gift of a share of stock-in-trade does not adeem a money legacy[1] unless the share is declared to be of a stated money value[2]—which really means that if a father gives his child a beneficial lease or share in a mill or any other thing, and says nothing about the value, he is not to be taken as giving it in satisfaction of a pecuniary bequest, but where the father in making such gift refers to or states its value, the presumption of satisfaction arises. And land will not be presumed to be a satisfaction for money, or money for land,[3] unless there are special circumstances showing that the value of the land was computed, and that it was regarded as money.[4] Considerable difficulty often arises as to what is sufficient intrinsic evidence of intention to rebut the doctrine.[5]

Extraneous or extrinsic evidence.

As regards extraneous or extrinsic evidence to rebut the doctrine of satisfaction or ademption, sometimes there may be express declarations of the donor that he meant the child to take both benefits, and sometimes the surrounding circumstances may show that such was his intention. Thus, in one case, a testator left his shares in a brewery to his three sons, Thomas, Henry, and Ernest, equally. At the date of his will he held twenty-one shares in the brewery, and the son Ernest was engaged in the brewery as a salaried manager. Subsequently, in response to requests from Ernest to the testator for an increase of salary, he was admitted into the business as a partner, giving up his salary and receiving two of the testator's shares. It was held that, even assuming that the two shares thus

Lacon v. *Lacon.*

[1] *Holmes* v. *Holmes*, 3 Bro. C. C., 555.
[2] *Re Lawes*, *Lawes* v. *Lawes*, 20 Ch. D., 81 ; 45 L. T., 480.
[3] *Ibid.*
[4] *Ibid.*
[5] See *Montague* v. *Earl of Sandwich*, 32 Ch. D., 525; 55 L. J., Ch., 925; 54 L. T., 502.

assigned to Ernest could be considered as a portion, the presumption against double portions was rebutted by the evidence of the testator's intention, and that Ernest was entitled to retain the two shares, and participate equally with his two brothers in the nineteen shares passing by the will.[1]

Principle of the admission of extrinsic evidence.

In admitting extraneous or extrinsic evidence to rebut the presumption of Equity, it must be borne in mind that there is no conflict with the general rule that parol evidence cannot be given to alter, add to, or vary a written instrument, or to prove with what intention it was executed; for the evidence is not admitted for the purpose of proving the intention in the first instance, but as dealing only with a presumption of the Court, for the purpose of ascertaining whether that presumption is well or ill founded.[2] Where there are two written instruments —say, first a will and then a settlement—in favour of the same child, though as they stand there would be two distinct benefits, yet the presumption of the Court primarily preventing this being so, parol evidence can be admitted for the purpose of showing that the child was really meant to take both. This is not contradicting or varying, but rather supporting the written instruments, and is but rebutting the presumption of Equity. But once admit parol evidence thus, and it becomes absolutely necessary to admit any counter parol evidence that may exist, so that, if possible, the presumption of Equity may be supported.[3] Thus, if by a will a legacy is given to a child, and afterwards there is an advancement or a settlement made in favour of such

[1] *Re Lacon*, *Lacon* v. *Lacon* (1891), 2 Ch., 482; 60 L. J., Ch., 403; 64 L. T., 429. See also *Re Scott*, *Langton* v. *Scott* (1903), 1 Ch., 1; 72 L. J., Ch., 20; 87 L. T., 574.

[2] *Kirk* v. *Eddowes*, 3 Hare, 509.

[3] 2 Wh. & Tu., 392.

child, here evidence might be given that the testator at the time of such advancement or settlement, or even subsequently, said that he still meant the child to have the legacy, and this might lead to considerable conflict of evidence on both sides. The rules as to the admissibility of extrinsic evidence are the same whether a will, or a settlement, comes first.[1]

Extrinsic evidence not admitted to raise a case of satisfaction.

But upon the principle that parol evidence cannot be given against written instruments, as distinguished from giving it to rebut what is merely a presumption, if a gift to a child is of such a nature that the Court would not itself raise the presumption of satisfaction, extrinsic evidence is not admissible to show that a satisfaction was in fact intended.[2]

Extrinsic evidence not admitted to contradict a writing.

Re Wood, Ward v. *Wood.*

It may be stated, as a general rule, that extrinsic evidence may be always given to merely rebut a presumption of Equity; but this rule must not be carried further, so as to originally introduce evidence to rebut, not a presumption, but a written instrument. Thus, in one case, a testator bequeathed certain property equally between his children, and after reciting that certain specified sums had been advanced by him to some of his children on account of their shares, he directed that such advancements were to be brought into hotchpot—that is, that any child taking under his will should bring into account the amounts of his advancements. Some of the children desired to give evidence to show that certain of the recited advances had in fact never been made. It was held that the evidence was inadmissible, for to admit it would be

[1] *Re Tussaud's Estate, Tussaud* v. *Tussaud*, 9 Ch. D., 363 ; 47 L. J., Ch., 849 ; Brett's Eq. Cas., 316.

[2] See 2 Wh. & Tu., 392 ; *Hall* v. *Hill*, 1 Dr. & War., 94 ; *Kirk* v. *Eddowes*, 3 Hare, 509.

to contradict the instrument under which they took their benefits.[1]

One case of satisfaction of legacy to a stranger.

Although, as has been stated, the doctrine of satisfaction does not apply to strangers, but only to children, and those towards whom a person has placed himself in *loco parentis*, yet, where a testator gives a legacy to any person, expressing it to be for a particular purpose, and afterwards he advances money for the same purpose, a presumption arises that the advancement was an ademption of the prior legacy, and, in the absence of evidence to the contrary, it will be so held.[2] But a legacy of £500 to A, for the benefit of B, an infant stranger, is not a legacy for a particular purpose within the rule, and is not adeemed by a subsequent settlement of the same sum, stated to be by way of provision for such stranger.[3]

Satisfaction in the case of legacies to creditors.

Talbot v. *Duke of Shrewsbury*.

Secondly, as to satisfaction in the case of legacies to creditors. The general rule on this subject is laid down in the leading case of *Talbot* v. *Duke of Shrewsbury*,[4] as being that where a debtor, without taking any notice of the debt, bequeaths a sum as great as, or greater than, the debt to his creditor, this shall be a satisfaction unless bequeathed upon some contingency, and that the creditor shall not receive both the debt and the legacy. The ground of the doctrine is—as has been stated, indeed, with regard to satisfaction generally[5]—that the testator must be presumed to have meant

Ground for this doctrine.

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[1] *Re Wood, Ward* v. *Wood*, 32 Ch. D., 517; 55 L. J., Ch., 720; 54 L. T., 932.

[2] *Monck* v. *Monck*, 1 Ball & B., 303; *Griffith* v. *Bourke*, 21 L. R., Ir., 92; *Corbett* v. *Cobham* (1903), 2 Ch., 326; 72 L. J., Ch., 757; 88 L. T., 591.

[3] *Weyman* v. *Smithies* (1903), 1 Ch., 259; 72 L. J., Ch., 216; 87 L. T., 792.

[4] 2 Wh. & Tu., 375.

[5] See *ante*, pp. 352, 353.

to be just before being generous; and, therefore, although a legacy is generally to be taken as a gift, yet, when it is to a creditor, it ought to be deemed to be an act of justice, and not of bounty, in the absence of countervailing circumstances, according to the maxim of the civil law, "*Debitor non præsumitur donare.*"[1]

Position where legacy to creditor and then debt paid.

It should be observed that where a person owing money, makes a bequest to his creditor which, by reason of the doctrine of satisfaction, operates as an extinguishment of the debt, and then, after making the will, he pays the debt, and dies without altering his will, the doctrine of satisfaction still applies, and the legacy will not be paid. Thus, in one case, A, owing his wife £625, made his will bequeathing her £625. He subsequently paid off the debt and then died. It was held that the wife was not entitled to the legacy.[2] In this case Mr. Justice North said: "I am told that there is no case in the books in which such a legacy has been treated as being in satisfaction of a debt, except where either the debt has continued to be in existence at the death of the testator, or the special purpose for which it was given has been mentioned in the will. But in my opinion, where the existence of the purpose is founded on a presumption of law, which there is no evidence to rebut, the case stands in the same position as if the purpose was stated in the will."

Re Fletcher, Gillings v. *Fletcher.*

The Court leans against satisfaction of debts by legacies.

The doctrine of satisfaction, generally, cannot be considered as altogether satisfactory, and in the case of legacies to creditors it has in particular met with much censure, and is deemed to have so little of solid foundation, either on general reasoning, or as a just

[1] Story, 769.

[2] *Re Fletcher, Gillings* v. *Fletcher*, 38 Ch. D., 373; 57 L. J., Ch., 1032; 59 L. T., 313.

interpretation of the intention of the testator, that slight circumstances have been laid hold of to escape from it, and to create exceptions to it.[1] Still it is difficult to see that it is more deserving of disapprobation than is the same doctrine arising in the case of portions to children. Be that, however, as it may, whilst the Court, as has been shown, leans in favour of the doctrine of satisfaction, or ademption, as regards portions to children, and strives, as it were, to hold anything a satisfaction or ademption when possible; yet in the case of legacies to creditors the reverse rule prevails, that is to say, the Court leans against satisfaction of a debt by a legacy, and will lay hold of trifling circumstances in order, if possible, to prevent it. Thus, even in *Talbot* v. *Duke of Shrewsbury*,[2] it was held that a legacy would only satisfy the debt if equal to it or greater in amount; and also that the fact of a legacy being given on a contingency would be sufficient to prevent satisfaction. In the leading decision, known as *Chancey's* Case,[3] it was also held that, notwithstanding the general rule, slight evidence of intention to be gathered from the will, would prevent there being any satisfaction; so that where there was a legacy to a creditor far exceeding the amount of the debt, but the will contained a direction that all the testator's debts and legacies should be paid, it was held that this direction showed an intention that the testator's debts should be paid as well as his legacies, and was sufficient to prevent the legacy to the creditor operating as a satisfaction of the debt. It will be observed that the direction in the will in this case was to pay debts and legacies, but it may now be

Chancey's Case.

[1] Story, 779. In *re Horlock*, *Calham* v. *Smith* (quoted *post*, p. 368), Mr. Justice Stirling said: "I join with the many judges who have disapproved the rule laid down. I equally disapprove of the exceptions taken to it. But both are binding on me; I take the law as I find it."

[2] 2 Wh. & Tu., 375; *ante*, p. 365.

[3] *Ibid.*, 376.

Re Huish.

considered as settled, that even when a testator directs debts to be paid without mentioning legacies, the same rule applies, and the presumption of satisfaction of a debt, by a legacy to the creditor, is rebutted.[1]

Instances showing this.

The fact that the legacy is given payable at a later time to that at which the debt will become payable, is sufficient to prevent satisfaction. Thus, where a debt is owing by a testator, which is payable immediately, and a legacy of larger amount is given, but the legacy is made payable a month after the testator's death, though practically the debt would not probably be paid before that time, yet there is the immediate right to sue for it, and this discrepancy is sufficient.[2] But where the testator owes a debt payable immediately, and without noticing the debt bequeaths to the creditor a larger sum of money, and the will does not specify any time for payment of the legacy and does not contain a direction to pay debts, this is a case of satisfaction.[3] Thus, in *Re Rattenberry, Ray* v. *Grant*,[3] the testator owed £150 at 5 per cent. interest and payable on demand, and bequeathed £400 to the creditor, and this was held to satisfy the debt. Swinfen Eady, J., pointed out that it had been laid down by Lord Hardwicke[4] that, for a legacy to satisfy a debt, the legacy must

Re Rattenberry, Ray v. *Grant.*

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[1] *Re Huish, Bradshawe* v. *Huish*, 43 Ch. D., 260; 59 L. J., Ch., 135; 62 L. T., 52.

[2] *Matthews* v. *Matthews*, 2 Ves., 635. See also *Re Roberts, Roberts* v. *Parry*, 50 W. R., 469.

[3] *Re Rattenberry, Ray* v. *Grant* (1906), 1 Ch., 667; 75 L. J., Ch., 304; 94 L. T., 475. This seems a preferable decision to that of Stirling, J., in *Re Horlock, Calham* v. *Smith* (1895), 1 Ch., 516; 64 L. J., Ch., 325; 72 L. T., 223, in which it was held that a debt of £300 covenanted to be paid three months after the death of testator was not satisfied by a legacy of £400, no time for payment of which was fixed by the will. It must be noticed that *Re Horlock* was argued and decided on the principle of the cases about legacies satisfying annuities, which, as pointed out in *Re Rattenberry*, are on a different footing to the cases about legacies satisfying debts.

[4] *Clark* v. *Sewell*, 3 Atk., 96.

take place immediately after the death of the testator; and he held that a legacy, for which no time of payment is specified in the will, is an immediate legacy for this purpose, although of course only payable in a due course of administration; and he further held that the legacy, being immediate and in satisfaction of a debt, itself carried interest from the testator's death. But if the debt is an annuity, it is not satisfied by the bequest of an equal or larger annuity,[1] unless the annuity under the will is payable on exactly the same days (or perhaps on earlier days) than the other annuity.[2] Therefore, to make a legacy a satisfaction of a debt, not only must it be equal to or greater than the debt, but it must, by law, or by the testator's direction, be payable as soon as the debt would itself be payable. This shows strongly the leaning of the Court against satisfaction in this class of cases, and it may further be mentioned —summing up a number of decisions, that a legacy will not be allowed to operate as a satisfaction of a debt (1) Where a particular motive is assigned for the gift; (2) Where the legacy is contingent or uncertain; (3) Where the bequest is of a residue; (4) Where the debt is a negotiable security; (5) Where the legacy is given to the creditor's wife; (6) Where the debt is upon an open and running account. And it is manifest that the presumption of satisfaction cannot arise where the debt of the testator was contracted subsequently to the making of his will, for he could have had no intention of satisfying, by the bequest, a debt which was not then incurred.[3]

Extrinsic evidence admitted to show legacy no satisfaction of debt.

The remarks that have already been made with regard to the admissibility of extrinsic evidence in

[1] *Re Dowse, Dowse* v. *Glass*, 50 L. J., Ch., 285.
[2] *Atkinson* v. *Littlewood*, L. R., 18 Eq., 595.
[3] Story, 770; see also Brett's Eq. Cas., Notes to *Tussaud* v. *Tussaud*, pp. 316-323.

cases of satisfaction of portions,[1] are equally applicable as regards the subject of satisfaction in the case of legacies to creditors.[2] Such evidence is admitted to rebut the presumption of satisfaction, and, when thus admitted, counter evidence is also allowed to be given; but extrinsic evidence is not admitted to contradict the plain effect of an instrument, and to raise a case of satisfaction. Thus—to illustrate this last statement—in one case A gave a bond for £800 to his son-in-law on his marrying his daughter, and thus created a debt. Then, by his will, he bequeathed £800 to his daughter. It was held that the bond must be met, and the legacy also paid, and that parol evidence was not admissible to show that A's real intention was to satisfy, by this legacy, the obligation he had incurred under the bond.[3]

Hall v. *Hill.*

Legacy by a parent to a child to whom he owes money.

Where a parent is really pecuniarily indebted to his child—that is, owes him money, which is in no proper sense a portion—the position with regard to the doctrine of satisfaction is the same as in the case of his being indebted to any other person, and the rules we have just been considering as to whether the legacy will, or will not, satisfy the debt, apply.[4] But where a parent, owing at the time a sum of money to his child, makes an advancement to such child upon marriage, or some other occasion, of a sum equal to or exceeding the debt, and in every other respect equally beneficial, it will *primâ facie* be considered to extinguish the debt.[5]

The question of whether legacies are cumulative or substitutional.

Somewhat allied to the doctrine of satisfaction—in fact, so much so that it is sometimes treated

[1] *Ante*, pp. 361-364.
[2] 2 Wh. & Tu., 397, 398.
[3] *Hall* v. *Hill*, 1 Dr. & War., 94.
[4] *Tolson* v. *Collins*, 4 Ves., 483; *Crichton* v. *Crichton* (1895), 2 Ch., 853; 65 L. J., Ch., 13; 73 L. T., 556.
[5] *Wood* v. *Briant*, 2 Atk., 521; *Plunkett* v. *Lewis*, 3 Hare, 316.

of as satisfaction[1]—is the subject of the repetition of legacies, and whether they are to be deemed cumulative or substitutional; that is, whether, when a testator leaves to a legatee two separate legacies, he will get them both, or will only get one of them. In a sense this may be said to raise a question of satisfaction, but the true principles of the doctrine of satisfaction are not involved, and the most that can be said is that, as in satisfaction, presumed intention is the key to the position.[2]

Hooley v. *Hatton*.

The leading case upon this subject is *Hooley* v. *Hatton*,[3] where it is laid down:—Firstly, that a specific thing cannot be given twice, which is a self-evident proposition, for if a testator having one horse, gives that horse to A, and then later on in the same will, or in a codicil, again gives that horse to A, of course A can only have the one horse. Secondly, that if a general legacy of the same amount is given twice in the same will, for the same cause, and in the same words, or only with small differences, then the legatee will not get both, but the one is in substitution for the other. Thirdly, that if a general legacy is given by will, and then to the same legatee there is a general legacy given by codicil, in the absence of internal evidence to the contrary, the legacies will be cumulative, and the legatee will get them both.

Reason why legacies by the same instrument are substitutional.

The reason for the secondly above-mentioned rule is, that the repetition is considered to arise from forgetfulness.[4] And this rule is applicable where, though the legacies are not strictly by the same instrument, yet they are so connected and incorporated, the one

[1] See Snell's Eq., 220.
[2] See Story, 771.
[3] 1 Wh. & Tu., 865.
[4] *Ibid.*, 874.

with the other, as substantially to amount to one instrument. Thus, where a testator executed at the same time two codicils, giving to the same person legacies of precisely the same amount, they were considered as being in substance both in one instrument, and were therefore deemed substitutional and not cumulative.[1] Where, however, the legacies, though given by the same, or substantially the same, instrument, are of unequal amount, they will be deemed to be cumulative.[2]

Reason why legacies cumulative when by different instruments.

The reason for the thirdly above-mentioned rule is the probable intention that he who has given at different times must have meant more than one benefit[3]; and this argument is strengthened when it appears that there is a variation as to the mode or time of payment of each legacy, though, indeed, it needs no strengthening. But, it will be noticed that this third rule is qualified by the statement that there may be internal evidence to the contrary. Thus, though the legacies are in different instruments, yet, if they are not given simply, but each is expressed to be for the same cause or motive, and each is identical in amount, the Court considers the two circumstances together as constituting evidence that the legatee was not intended to take both, and the one will be deemed in substitution for the other.[4] But the Court will not take this view if, in either instrument, there is no motive expressed, or there is a different or additional motive expressed, although the sums are the same,[5] nor, although the same motive be expressed, if the sums are different in amount.[6]

[1] *Whyte* v. *Whyte*, L. R., 17 Eq., 50.
[2] *Curry* v. *Pile*, 2 Bro. C. C., 662.
[3] *Hooley* v. *Hatton*, 1 Wh. & Tu., 825.
[4] *Benyon* v. *Benyon*, 17 Ves., 34.
[5] *Rock* v. *Cullen*, 6 Hare, 531.
[6] *Hurst* v. *Beach*, 5 Madd., 352.

When extrinsic evidence is here admitted, and when not.

With regard to the admissibility of extrinsic evidence to solve the question of whether legacies are meant to be cumulative or substitutional, the reader is reminded of what has been already stated as a general rule,[1] viz.: that such evidence is always admitted for the purpose of merely rebutting a presumption of Equity, but not to rebut a written instrument. In all cases in which the written instruments show two distinct legacies, to allow extrinsic evidence to be given to prove that the legatee was only meant to have one of them, would be to contradict the instruments, and it is therefore not admitted. Thus, if one legacy is given by will, and another by codicil, so that primarily the legatee will get both, evidence cannot be given to show that the testator intended the legacy by the codicil to be in substitution for that given by the will.[2] But, where the presumption of Equity is to deprive the legatee of what, according to the instruments, he is to get, extrinsic evidence is admissible to rebut that presumption, for this is in effect to support the instruments. Thus, if two legacies of the same amount are given by the same instrument to a legatee, so that primarily he will by the Court's presumption only get one, evidence may be given to show that he was meant to have both, *e.g.*, instructions given by the testator on the making of his will, or letters written or statements made by him.[3]

Performance.

We have now to consider when an act which is not manifestly a performance of an obligation, is yet so construed by the Court; in other words, the doctrine of the Court known as Performance, in respect of which the rule of Equity is, that where a person has covenanted to do an act, and he does

[1] *Ante*, pp. 363, 364.
[2] *Re Pinney*, 46 S. J., 552; *Wilson* v. *O'Leary*, 7 Ch., 448.
[3] 1 Wh. & Tu., 875.

that which may reasonably be considered as either wholly or partially a performance of the covenant, he shall be presumed to have done such act with the intention of it so operating.

Lechmere v. *Lechmere.*

The case of *Lechmere* v. *Lechmere*[1] furnishes a good illustration of this doctrine. There a husband on his marriage covenanted to lay out £30,000, within one year of his marriage, in the purchase of fee simple lands in possession, with the consent of trustees, such lands, when bought, to be settled upon certain trusts, under which the settlor's heir ultimately became entitled. After the marriage he bought certain fee simple lands in possession, but not within the year, and neither to the required amount, nor with the consent of the trustees, and shortly afterwards died intestate. The heir contended that what had been done was no performance at all of the covenant, which remained entirely unfulfilled, and that he was entitled: (1) to the fee simple lands which had been bought, and (2) to have the entire £30,000 now laid out for his benefit in the purchase of lands which would come to him under the settlement. The administratrix, however, contended that the fee simple lands which had been bought, and which descended to the heir, were a part performance of the covenant. The Court decided in her favour, acting on the principle of the presumed intention of the deceased, who, knowing of his covenant, bought lands of the description provided for by it; and though it was true that the purchase was not within the year, and neither was it to the required amount, nor with the consent of the trustees, yet these circumstances of difference did not hinder the presumed intention. Certainly the strict observance of the time for purchase was not of the essence of the covenant,

[1] 2 Wh. & Tu., 399.

and as to the consent of the trustees, that might, on ordinary principles of ratification, have been given afterwards. It was, therefore, ordered that an account should be taken of what fee simple lands in possession were purchased after the covenant, and the amount paid for the same; and that the amount so appearing to have been expended should be taken in part performance of the covenant, and that the residue then remaining to make up the £30,000 should be paid out of the personal estate, the heir thus only taking the difference and the lands which had been purchased.

Remarks on *Lechmere* v. *Lechmere*, and an extension of it.

Many instances might be given of the application of the doctrine of performance, by the Court, in similar cases[1]; but *Lechmere* v. *Lechmere* is a peculiarly good example, because there were there some differences between the obligation, and what in fact was done, and it, therefore, strongly illustrates the maxim, "Equity imputes an intention to fulfil an obligation,"[2] which maxim, it must be remembered, is the foundation both of the doctrine of Satisfaction and the doctrine of Performance.[3] The doctrine has also been extended to a case where the covenant was to pay money to trustees, to be laid out by them in the purchase of land, and the covenantor paid over no money, but himself bought land and died intestate; it was held that the land bought by him would pass to the trustees.[4]

When acts not deemed to be a performance.

But, if there are great differences between the thing covenanted to be done and the thing done, or if it is manifestly impossible to consider that a

[1] See *Wilcocks* v. *Wilcocks*, 2 Vern., 558; *Deacon* v. *Smith*, 3 Atk., 323.
[2] See *ante*, p. 19.
[3] *Ante*, p. 352.
[4] *Snowden* v. *Snowden*, 3 P. Wms., 228.

particular thing could have been intended to be a performance, then the doctrine will not apply. The case of *Lechmere* v. *Lechmere* will here again serve, as two points were decided there beyond what has been mentioned, viz., firstly, that under the covenant in question, reversionary estates in fee simple, purchased since the covenant had been entered into, could not go in performance of the covenant, for that was to buy and settle fee simple lands in possession; and, secondly, that certain purchases of fee simple land in possession, made before entering into the covenant, could not be considered as a performance, as it was impossible that they could have been so intended, the obligation not having been then created. And, generally, it cannot be presumed that property, of a different nature from that covenanted to be purchased, was acquired, and meant to operate, as a performance, *e.g.*, where the covenant is to buy and settle freeholds, and leaseholds are then purchased; or where the covenant is to buy and settle lands of inheritance to be settled without impeachment of waste, and copyholds are then purchased, for copyholds could not be thus settled without impeachment of waste.[1] Where, however, the covenant is simply to purchase and settle lands, then copyholds, subsequently bought, will be a performance.[2]

Purchasing land under covenant, and then mortgaging it.

Where a person, who has entered into a covenant to purchase and settle lands, subsequently buys lands under circumstances which make such purchase a performance, or part performance, of the covenant, and then he executes a mortgage of them instead of proceeding to settle them as he should have done, the mortgagee will gain a good title if he took without notice of the unperformed covenant; but if

[1] *Pennell* v. *Hallett*, Amb., 106.
[2] *Wilkes* v. *Wilkes*, 5 Vin. Abr., 293.

he took with notice, it is doubtful whether this will be so.[1] And it has been held that, if the mortgagee does obtain a good title, the land subject to the mortgage—that is, the equity of redemption—will still go under the covenant.[2]

Performance by death, intestate.

Cases of performance may also arise from the merely quiescent act of the death, intestate, of the person on whom an obligation rests. The rule on this point is substantially laid down by the leading case of *Blandy* v. *Widmore*,[3] viz., that if a person covenants to leave, or that his executors shall pay, to another a sum of money, or part of his personal estate, then if such person dies intestate, and the person for whose benefit the covenant was made becomes, under the Statute of Distributions, entitled to a portion of the covenantor's personal estate, of equal or greater amount, such distributive share will be a performance of the covenant, and he cannot claim both. In this case a person had covenanted to leave his wife £625 by will. He died intestate, but his widow's share, under the Statute of Distributions, exceeded £625. She contended that she was entitled to the sum agreed to be left to her, and also to her distributive share. The Court, however, decided that she could only claim to be paid her distributive share, upon the principle that the covenantor, knowing of his covenant, meant to perform it by means of the share his widow must receive under the Statute of Distributions. If, in any such case, the distributive share is less than the sum covenanted to be left, the same principle will apply, and it will be taken to be a part performance.[4]

Blandy v. *Widmore*.

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[1] *Deacon* v. *Smith*, 3 Atk., 327 ; *Ex parte Poole*, 11 Jur., 1035.
[2] *Ex parte Poole*, *supra*.
[3] 2 Wh. & Tu., 407.
[4] *Garthshore* v. *Chalie*, 10 Ves., 14.

Oliver v. *Brickland.*

But this principle does not apply where an actual debt is created in the lifetime of the covenantor. Thus, where a husband covenanted to pay his wife a certain sum of money within two years, and he lived more than two years, but did not pay the money, and died intestate, it was held that his widow was entitled to the amount covenanted to be paid, and also to her distributive share.[1] Nor does the principle apply where the covenant is not to pay a definite sum, but only to give a life interest, *e.g.*, an annuity, or the interest on a sum of money. Thus, where a man covenanted to leave his wife the interest on a certain fund, and he died intestate, it was held she was entitled to the life interest, and to her distributive share.[2] Nor does the principle apply if the covenantor makes a gift by will, for that imports the intention to make an additional bounty.[3]

[1] *Oliver* v. *Brickland*, 3 Atk., 420.
[2] *Couch* v. *Stratton*, 4 Ves., 391.
[3] *Haynes* v. *Mico*, 1 Bro. C. C., 129.

CHAPTER III.

CONVERSION AND RECONVERSION.

Definition of conversion.

CONVERSION may be defined as an imaginary, or constructive, change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character.[1] Reconversion may be defined as that notional or imaginary process whereby a prior constructive conversion is annulled.

Definition of reconversion.

General explanation of the two doctrines.

The equitable doctrine of conversion arises as a natural consequence of the maxim, "Equity looks upon that as done which ought to be done"[2]; for if a man agrees to sell his land, or to invest his money in land, then that property which he is possessed of, be it land or money, changes, as it were by magic, and the Court says that it must at once be deemed as of the nature into which he has agreed to change it. So, if it is not a matter of contract, but of direction in a deed or will, the same result ensues, and land directed to be sold is at once considered as money, and money directed to be invested in land is immediately deemed to be land. This equitable doctrine is not opposed to common sense, but is rather in accordance with it. The equitable doctrine of reconversion is even more so, it simply meaning that where there is, by reason of a direction, a constructive conversion, and the property, the subject of the conversion, belongs absolutely to a person, that person may elect to either take the

[1] Story, 837.
[2] *Ante*, p. 18.

property as thus constructively converted, or he may say he desires no conversion, and by this election, as by the stroke of a conjuror's wand, the doctrine of the Court vanishes, and the property goes as it actually is, for it has been said "Equity, like Nature, will do nothing in vain,"[1] and, whatever we may think of that as a general axiom, it serves our purpose here. To instance the two doctrines, let us take the following simple case:—A, by his will, directs a freehold estate to be sold, and the proceeds paid to B. A dies, and this benefit B takes, is considered as money though the estate is still existing, and, were B now to die intestate, this property would go to his next-of-kin, for there is a constructive conversion by reason of the direction in A's will. But if B directs the trustees not to sell the estate, as he, being entitled to the whole proceeds, prefers and intends to take it as it stands, and then he dies intestate, this property will go to his heir, for here there has been reconversion—in the words of the definition given above, a notional process has taken place, which has annulled the prior constructive conversion.

Example showing both doctrines.

How conversion may occur.

Conversion may occur either: (1) by force of contract, (2) by a direction contained in a deed or will, or (3) by reason of an order of the Court. This conversion may either be of land into money, or money into land, and this is well expressed in the leading case of *Fletcher* v. *Ashburner*,[2] as follows:—"Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is

Fletcher v. *Ashburner*.

[1] Lord Cowper, in *Seeley* v. *Jago*, 1 P. Wms., 389.
[2] 1 Wh. & Tu., 327.

given, whether by will, by way of contract, marriage articles, settlement, or otherwise."

Conversion by reason of contract.

The effect of conversion by contract is well shown in the case of a devise of an estate, and then an agreement to sell it, and the death of the testator before conveyance; here the devisee gets nothing, for had the estate been actually conveyed away he could have got nothing, and Equity considers it as conveyed. The contract to sell, in effect, revokes the prior devise, and the devisee will not get the purchase-money as standing in the place of the estate, but that will go to the residuary legatee, or next-of-kin, as the case may be. Again, if a man agrees to buy freehold land, and dies before it is conveyed to him, yet the land will go to his residuary devisee, or his heir, as the case may be; and formerly such residuary devisee or heir would have been entitled to have the purchase-money paid out of the general personal estate, but this is no longer so, and the heir or devisee takes the property subject to the payment of the purchase-money, or the balance thereof.[1]

No conversion by abortive or unenforceable contract.

An abortive contract, or one which cannot be enforced in Equity, will not effect a conversion; thus, if a trustee enters into a contract for the purchase of the trust property under circumstances when the Court would not permit him to purchase,[2] such a contract will not be considered as changing the money into realty.[3] And where a testator, after making his will, entered into a contract for the sale of his freehold property, and died before completion, and then his trustees, finding that a title could only be made to a portion of the property, rescinded the

[1] 30 & 31 Vict., c. 69; 40 & 41 Vict., c. 34; see *ante*, pp. 158, 159.
[2] As to a trustee purchasing of his *cestui que trust*, see *ante*, p. 102.
[3] See *Ingle* v. *Richards*, 28 Beav., 361.

contract under the usual clause in the conditions of sale, it was held that there was no conversion effected by the contract the testator had entered into; so that when the property was afterwards resold by the trustees, and there was a surplus after carrying out certain directions in the will, it was held that such surplus—there being no residuary devise—went to the testator's heir-at-law.[1]

Conversion under the Lands Clauses Act 1845.

A notice to treat given to the owner of lands in fee simple, by a railway company, or other body having compulsory powers to purchase lands, is not sufficiently a contract to operate as a conversion of the land into money[2]; but when subsequently the price is fixed, whether by arrangement, arbitration, or by a jury, then there is a complete contract, and conversion takes place.[3] If money is paid into Court under the Lands Clauses Consolidation Act 1845,[4] when the parties are competent to convey, such money is at once treated, and devolves, as personalty,[5] but if the parties are under disability,[6] it is then, whilst the disability continues, treated, and devolves, as realty.[7]

Effect of giving an option to purchase.

When a person has given to him an option of purchasing property, and he exercises that option, this constitutes a contract so as to cause conversion.[8] The option to purchase is substantially an offer, and when the person exercises the option, then there is, in fact, an acceptance, and the offer and acceptance

[1] *Re Thomas*, *Thomas* v. *Howell*, 34 Ch. D., 166; 56 L. J., Ch., 9; 55 L. T., 629.
[2] *Haynes* v. *Haynes*, 1 Dr. & Sim., 426.
[3] *Ex parte Hawkins*, 13 Sim., 569; *Harding* v. *Metropolitan Railway Company*, L. R., 7 Ch. App., 154; 41 L. J., Ch., 371.
[4] 8 & 9 Vict., c. 18, sec. 78.
[5] *Re Tugwell*, 27 Ch. D., 309; 53 L. J., Ch., 1006; 51 L. T., 83.
[6] 8 & 9 Vict., c. 18, sec. 69.
[7] *Kelland* v. *Fulford*, 6 Ch. D., 491.
[8] *Lawes* v. *Bennett*, 1 Cox, 167.

together constitute a contract, making the position the same as if there had been a direct contract for sale and purchase in the first instance. Thus, A makes a lease of a freehold house to B for seven years, giving him by the lease an option of purchasing the property at a certain price during the term. It may be that B never exercises his option, and then it is only, as it were, an offer made and not accepted; but if B during the term exercises his option, then there is a contract. It has been argued that, when the option is exercised, a contract is constituted as from the date of the instrument conferring the option, but it is now decided that, in such a case, there is only a contract, as regards the rights of the vendor and purchaser as against each other, from the date of the exercise of the option.[1] Thus, in the instance just given, suppose A has insured the house for £2,000, and it is burnt down, and then B exercises his option to purchase, B will not be entitled to claim that the money coming from the policy should be taken as part payment of his purchase-money. But this rule as to what shall be deemed the date of the contract produced by the exercise of the option does not apply as regards the rights of the real and personal representatives of the person who has conferred the option; for, to determine their rights, the exercise of the option is deemed to have a retrospective operation back to the date of the instrument giving the option.[2] Thus, to keep to the instance given, suppose A dies intestate, and then B exercises his option, there is now the question, does the purchase-money go to A's heir or to his next-of-kin? It was realty at A's death, but now, by the exercise of the option, it has been converted, and, for the purpose of determining the devolution, the position is considered to be the

From what date there is a contract when option to purchase exercised.

[1] *Edwards* v. *West*, 7 Ch. D., 858; 47 L. J., Ch., 463.
[2] *Lawes* v. *Bennett*, 1 Cox, 167; *Edwards* v. *West*, *supra*.

same as if there had been an actual contract to sell during A's lifetime, that is, at the date of the lease; and, therefore, the purchase-money goes to the next-of-kin. But, although this is technically the position, it has been decided that until B exercises his option, A's heir will take the rent of the house.[1]

Three results or rules to be observed hereon.

Upon this subject three results or rules may be observed, which are chiefly to be gathered from what has been stated.

1. Option to purchase, and intestacy or general devise.

Firstly. Where freehold property is subjected by the owner to an option to purchase, and such owner then dies intestate, or dies having (either previously or subsequently) devised all his realty to one person and bequeathed all his personalty to another, the question whether the property will go to the heir in the one case, or the devisee in the other case, depends entirely upon whether the option is exercised or not. If never exercised, the heir will take in the one case, and the devisee in the other. If it is exercised, then the money will go to the next-of-kin in the one case, and to the legatee in the other[2]; and this is so even although the lessee has no right or option to purchase until after the lessor's death.[3] But though the option is exercised, until such exercise the rents and profits of the property will go to the heir in the one case, and to the devisee in the other.[4]

Lawes v. *Bennett.*

2. Specific devise and then option to purchase.

Secondly. If a testator specifically devises freehold property to a person, and afterwards subjects it to an option to purchase, and then dies, whether the devisee takes depends entirely upon whether the

[1] *Townley* v. *Bedwell*, 14 Ves., 591.
[2] *Lawes* v. *Bennett*, 1 Cox, 167; *Collingwood* v. *Rowe*, 5 W. R., 484; *Townley* v. *Bedwell*, *supra.*
[3] *Re Isaacs*, *Isaacs* v. *Re*s*inall* (1894), 3 Ch., 506; 63 L. J., Ch., 815; 71 L. T., 386.
[4] *Lawes* v. *Bennett*, *supra.*

option is exercised or not. If not exercised, the devisee will get the property; if exercised, he will not. But though the option is exercised, until such exercise he will get the rents and profits.[1]

3. Option to purchase and then specific devise.

Drant v. *Vause.*

Thirdly. But if a person subjects freehold property to an option to purchase, and afterwards makes a will which specifically devises it, the devisee must get either the property or the purchase-money, for the property being named, and being already subjected to the option, the testator must have meant to pass to the specific devisee either the estate, or what will represent it.[2] In a recent case this doctrine seems to have been somewhat extended. A testator devised certain real estate specifically, and subsequently made a codicil confirming his will but not in terms referring to the specific devise, and he also on the same day (but whether before or after the execution of the codicil did not appear) executed a lease of the real estate so devised, giving the lessee an option to purchase the same. The option was exercised after the testator's death, and it was held that there was sufficient indication of intention on the part of the testator that he meant the devisee to take the property, or the proceeds thereof, and that the specific devisee thereof was entitled to the proceeds.[3]

Pyle v. *Pyle.*

As to arranging with person having the option.

It may occur to the reader, with reference to the first and second results given above, that the best thing the heir or devisee could do, would be to arrange with the person having the option that he should not exercise it. This was suggested in argument in one

[1] *Weeding* v. *Weeding*, 1 J. & H., 424.
[2] *Drant* v. *Vause*, 1 Y. & C. C. C., 580; *Emuss* v. *Smith*, 1 De G. & Sm., 722.
[3] *Re Pyle*, *Pyle* v. *Pyle* (1895), 1 Ch., 724; 64 L. J., Ch., 477; 72 L. T., 327.

case,[1] but the Court expressed an opinion that if such a thing appeared to have been done collusively, to oust the next-of-kin or legatee, the Court would relieve. There does not, however, appear to be any express decision on the point.

Conversion by direction.

With regard to conversion by direction—whether contained in a deed or a will—for a direction to have that effect, it must be express and imperative, for, if merely optional, the property will be considered as real or personal, according to the actual condition in which it is found at the time when the question of its devolution arises. Thus, where the direction is to invest certain moneys either in the purchase of consols or of freehold land, no conversion will ordinarily take place by reason of this direction, unless and until the trustees actually exercise their discretion by investing in land. The property will in fact devolve according to the investment chosen.[2] In all cases where there is merely a discretion or power to convert, as distinguished from an absolute direction or trust, no conversion takes place until the discretion is exercised[3]; and where words requiring the request or consent of parties to a sale of land, or investment of money in land, are inserted for the purpose of giving a discretion to them, if the sale or investment takes place without their request or consent, the property will still be considered as remaining in its original state.[4]

Time from which conversion takes place.

In cases of direction to convert, there is an important difference with regard to the time from which conversion takes place, according to whether the direction is contained in a will or in a deed.

[1] *Lawes* v. *Bennett*, 1 Cox, 167.
[2] 1 Wh. & Tu., 989.
[3] *Walter* v. *Maude*, 19 Ves., 424; *Atwell* v. *Atwell*, L. R., 13 Eq., 23.
[4] *Davies* v. *Goodhew*, 6 Sim., 685.

In the case of a direction contained in a will, following out the rule that a will speaks from the date of the testator's death, a constructive conversion takes place only from that period,[1] but in the case of a direction contained in a deed, a constructive conversion takes place from the date of the deed, even though the sale or investment is directed to be made at a future date.[2] Thus, if a settlement of real estate is made, under which the property is vested in trustees in trust to sell after the settlor's death for certain specified purposes, there is nevertheless a constructive conversion from the date of the deed, so that should some of the objects for which the conversion was directed fail, the next-of-kin of the settlor will take, and not the heir; for though at the settlor's death the property was land, it was, as between the heir and the next-of-kin, impressed with the character of personalty from the moment the deed was executed.[3] But if the objects of a conversion directed by a deed *wholly* fail, there is no conversion, and the property results to the settlor in its original condition.[4]

Griffiths v. *Ricketts.*

Where, under a mortgage of freeholds, a sale takes place during the lifetime of the mortgagor, of course, any surplus belongs to his personal representatives; but if the sale does not take place until after the mortgagor's death, the equity of redemption having descended to the heir, if a sale takes place afterwards the heir is entitled to any surplus.[5]

Who is entitled to surplus of mortgaged property after death of mortgagor.

Beyond the instances that have already been given, other results of the doctrine of conversion may well

Curtesy and dower.

[1] *Beauclerk* v. *Mead*, 2 Atk., 167.
[2] *Griffiths* v. *Ricketts*, 7 Hare, 311.
[3] *Griffiths* v. *Ricketts*, *supra*; *Clarke* v. *Franklin*, 4 K. & J., 257.
[4] *Clarke* v. *Franklin*, *supra*.
[5] *Bourne* v. *Bourne*, 2 Hare, 35.

be noticed. Thus, if money is directed to be converted into land, then though the death of the person for whose benefit the conversion is directed occurs before the actual investment is made, yet the money will be subject to either curtesy or dower, as the case may be.[1] Again, money agreed or directed to be laid out in the purchase of land will pass under a general devise of all the lands of the person entitled thereto[2]; and, conversely, where land is agreed or directed to be sold, it will not pass under a general devise of land, but will go to the residuary legatee.[3]

Money passing under general devise.

Every conversion by direction is for the purpose of accomplishing some object, and before there has been an actual conversion, there may be either a total or a partial failure of the object. The former case is simple, the position being merely that the direction to convert immediately ceases to have any effect, and that the property will devolve as it is,[4] and it makes no difference whether the conversion is by a deed or a will.[5] But where the failure is only partial, the matter is not so simple. The leading case upon this point is *Ackroyd* v. *Smithson*.[6] There, the testator by his will gave several legacies, and directed his real and personal estate to be sold, and after payment thereout of his debts and legacies he gave the residue of the fund to certain persons, two of whom died in his lifetime. Here, there was a lapse of these two shares, and this action was brought by the testator's personal representatives, claiming these lapsed shares, and the question was whether such shares—being originally

Failure of objects for which conversion directed.

Ackroyd v. *Smithson*.

[1] *Sweetapple* v. *Bindon*, 2 Vern., 536; 1 Wh. & Tu., 334.
[2] *Greenhill* v. *Greenhill*, 2 Vern., 679.
[3] *Stead* v. *Newdigate*, 2 Mer., 521.
[4] See *Clarke* v. *Franklin*, 4 K. & J., 257.
[5] *Buchanan* v. *Harrison*, 1 J. & H., 662; *Fitch* v. *Weber*, 6 Ha., 145; *Goodier* v. *Edwards* (1893), 3 Ch., 95; 62 L. J., Ch., 649; *Re Daveron* (1893), 3 Ch., 921; 63 L. J., Ch., 54; 69 L. T., 752.
[6] 1 Wh. & Tu., 372.

composed partly of realty and partly of personalty—belonged to the next-of-kin of the testator, or whether the part originally composed of real estate still retained that quality, so as to descend to the testator's heir-at-law. It was held that so far as the shares originally consisted of personal estate, they went to the next-of-kin, but so far as they originally consisted of real estate, they went to the heir-at-law.

Reason of *Ackroyd* v. *Smithson*.

The reason of this decision is, no doubt, to be found mainly in the idea of carrying out the intention of the testator. Certainly, it was the testator's design to convert his real estate into personal estate, out and out, for the purposes of the will—*i.e.*, for the benefit of the residuary legatees—and there was a complete conversion as regarded them; but when certain of the persons could not take, and the property must therefore go to someone else, it was impossible to infer a similar intention to convert in favour of the next-of-kin, whom the testator never had in contemplation. An event, in fact, happened that was never in the testator's mind. There was no direction to convert for the benefit of any persons other than those named in the will, and therefore it appears a logical consequence to say that, if any of the objects fail, the property must go to the persons who would have taken in the event of a simple intestacy. And even when a testator directs his real estate to be sold and the proceeds to be held as a fund of personalty, and that such proceeds or any part thereof shall not in any event lapse or result to his heir, such proceeds, nevertheless, belong to the heir unless the will effectually gives them to some other person.[1]

[1] *Fitch* v. *Weber*, 6 Ha., 145; *Singleton* v. *Tomlinson*, 3 App. Ca., 909.

The same principle applies to cases of money to be laid out in land.

Cogan v. *Stevens.*

Ackroyd v. *Smithson* is a decision only upon the point of partial failure, and a consequent resulting trust, in the case of land to be converted into money. But it has been decided that the same principle applies in the case of money directed to be laid out in the purchase of real estate, so that the undisposed of interest in the money, or the estate, if purchased with the money, will result for the benefit of the testator's next-of-kin, and not go to his heir-at-law.[1]

Distinction in application of the principle according to whether the conversion is directed by deed or will.

A distinction which has been already somewhat referred to in dealing with the point of the date from which a conversion takes place,[1] must be carefully observed in the application of the principle of *Ackroyd* v. *Smithson*, to conversions directed by deed, and by will, respectively. As regards wills, there the resulting trust is either to the heir, or next-of-kin, according to the nature of the property at the time of the testator's death. As regards deeds, however, bearing in mind what has been stated,[2] viz., that the deed operates from the moment of execution, the resulting trust in case of failure of the objects, or any of them, is to neither heir-at-law nor next-of-kin, but to the settlor himself. If the objects wholly fail there is no conversion, and the property results to the settlor in the actual state in which it was, but if the objects only partially fail, then the property is immediately impressed with that character into which it is directed to be changed, and results to the settlor in that changed state.[3]

The question as to the quality in which property results on failure of objects of conversion directed by will.

Where the conversion which fails is directed by will, so that the property results, according to its nature at the time of the testator's death, either to the heir-at-law, or next-of-kin, the further question

[1] *Cogan* v. *Stevens*, 1 Beav., 482.
[2] See *ante*, pp. 385, 386.
[3] 1 Wh. & Tu., 382; and see *ante*, p. 386.

then arises—how does the person to whom it results take it, so that were he then in his turn to die immediately, would it in his hands be realty or personalty? Thus, a testator has directed a conversion of Whiteacre for objects which fail, and Whiteacre results to A, who is the testator's heir-at-law, and naturally it is realty, and were he to die it would devolve as such. That is manifest. But suppose only some of the objects fail, and the result, therefore, ultimately is, that a sum of cash, being part of the proceeds of the sale of Whiteacre results to A, and A has died either before the sale, or after the sale, but before the proceeds have been paid over to him, does the amount go to his heir-at-law, or to his next-of-kin? Or, to take the converse position, suppose a testator directs £10,000 to be invested in the purchase of land for certain objects which wholly fail, here, no investment having been made, it is manifest that the £10,000, resulting say, to B, who is testator's sole next-of-kin, must be personalty in B's hands, and devolve as such. But suppose some only of the objects fail, and the investment has been made, and the result is, that a portion of the land results to B, and B has died either before the investment was made, or after it has been made, does it go to B's heir-at-law or next-of-kin? The following rules will meet the various cases:—

Rule 1.

1. If land is directed to be converted into money for a purpose which wholly fails, so that the land is not sold, or ought not to have been sold, then the heir to whom the land—or, if sold, the proceeds thereof—results, takes it as real estate, and it will devolve accordingly, unless, indeed, the cash has actually been paid over to him.[1] Thus, Whiteacre

Illustration.

[1] *Chitty* v. *Parker*, 2 Ves., Jun., 271; *Davenport* v. *Coltman*, 12 Sim., 610.

is devised to trustees upon trust to sell and pay the proceeds to B. B predeceases the testator, and there being no residuary devise in the will, the testator's heir-at-law, C, takes Whiteacre. Suppose, however, that the trustees, not knowing of B's death, sell Whiteacre, and then whilst the money is still in their hands, C, the heir-at-law, dies intestate, the money, the proceeds of Whiteacre, will still go, as Whiteacre would have gone, to C's heir-at-law.

Rule 2.

2. If land is directed to be converted into money for a purpose which only partially fails, so that it is necessary to sell the land, here the surplus will belong to the heir as money, and devolve as part of his personal estate, and this even though the sale is not made until after the heir's death.[1] Thus, Whiteacre is devised to trustees upon trust to sell and pay the proceeds to A and B equally. B predeceased the testator, so that there is a lapse of his share. The trustees sell, and Whiteacre realizes £4,000, of which A takes £2,000, and C, the heir-at-law of the testator—there being no residuary gift in the will—takes £2,000. But, suppose now, C in his turn dies intestate, either before, or after, the trustees have sold Whiteacre, C's £2,000 will go to his next-of-kin.

Smith v. *Claxton.*

Illustration.

Rule 3.

3. If money is directed to be converted into land for a purpose which wholly fails, so that the investment is not made, then the next-of-kin, of course, take the money as personalty. Thus, suppose a testator gives £4,000 to trustees in trust to buy a freehold estate for the benefit of A. A predeceases the testator, so that there is a lapse. There is no residuary gift in the will, and X and Y, the next-of-kin of the testator, take. Suppose, however, X dies intestate shortly after the testator's death,

Illustration.

[1] *Smith* v. *Claxton*, 4 Madd., 484; *Re Richerson, Scales* v. *Heyhoe* (1892), 1 Ch., 379; 61 L. J., Ch., 202; 66 L. T., 174.

naturally X's share of the money goes in due course to his next-of-kin.

Rule 4.

4. If money is directed to be converted into land for a purpose which wholly fails but the investment is actually made, or for a purpose which partly fails so that the investment ought to be made, then it is land which results to the next-of-kin, and he will take it as real estate, and it will devolve as part of the real estate of that person to whom it has come as next-of-kin.[1] This, of course, in the case of the purpose wholly failing, is a different result to what is found, as is stated in Rule 1, in the case of land directed to be sold for a purpose which wholly fails, but which, in fact, is sold, though it ought not to have been. Thus, a testator bequeaths £4,000 to trustees in trust to buy a freehold estate for the benefit of A, who, however, has predeceased the testator, so that there is a lapse. Suppose that the trustees, not knowing of A's death, buy a freehold estate with the £4,000, still this freehold estate will, in due course, go to X and Y, who were the testator's next-of-kin at the time of his death; but suppose that X has since died, whether before or since the investment was made, his share in the real estate will go to his heir-at-law, and not to his next-of-kin.

Curteis v. *Wormald.*

Illustration.

What *Ackroyd* v. *Smithson* really decided

Returning again to the direct decision in *Ackroyd* v. *Smithson*, it will be observed that all that was really decided in that case was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for those purposes must go to the person who would have been entitled but for the will.[2] And it has

[1] *Curteis* v. *Wormald*, 10 Ch. D., 172, overruling *Reynolds* v. *Godlee*, Johns, 536.

[2] Per Sir G. Jessel, M.R., in *Steed* v. *Preece*, L. R., 18 Eq., 192; 43 L. J., 687.

Conversion by order of the Court.

Steed v. *Preece.*

been held that if a conversion has been rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow if there is no equity in favour of any person to produce a different result.[1] Thus, in the case just referred to, in an administration suit the Court considered it beneficial to sell freehold property to which an infant was entitled, which was accordingly done, and the purchase-money was paid into Court, and carried to the infant's separate account. The infant died without having attained 21, and it was held that the fund belonged to his personal representatives, and was not to be treated as realty. And it is presumed that the position would be the same if it were not a sale by the Court, but by trustees in the proper exercise of a discretion vested in them, or by a guardian, if justified under the circumstances in selling. However, as to a guardian, he will not generally be permitted to change the character of his ward's property, and thus affect the rights of the ward's real and personal representatives, but there may be peculiar circumstances justifying it, as where it is manifestly for the ward's benefit.[2]

Guardian cannot ordinarily effect conversion.

Conversion takes place from date of order.

Hyett v. *Mekin.*

Where in an action for administration, the Court, in the exercise of its jurisdiction, makes an order for the sale of real estate, it has been decided that the order effects an immediate conversion from its date, and before any sale under it has actually taken place.[3]

Equity to prevent effect of conversion.

It has already been stated, as a general rule, that where a conversion has been rightfully made, either

[1] *Steed* v. *Preece*, L. R., 18 Eq., 192; 43 L. J., 687; Brett's Eq. Cas., 148. As to what will constitute such an equity as mentioned above, see *Foster* v. *Foster*, 1 Ch. D., 588; 45 L. J., Ch., 301; *post*, p. 394.

[2] See *Ex parte Phillips*, 19 Ves., 122; *Vernon* v. *Vernon*, cited 1 Ves., Jun., 456.

[3] *Hyett* v. *Mekin*, 25 Ch. D., 735; 53 L. J., Ch., 241.

by the Court, or by a trustee, all the consequences of a conversion must follow, if there be no equity in favour of any person to produce a different result. As an instance of such an equity may be mentioned the case of a partition suit affecting real estate, in which the property is sold under the order of the Court, and to which a person under disability, *e.g.*, an infant, is entitled to a share. Here, if the order for a sale is not founded on the infant's interest, but is made for general convenience, and the infant then dies, the heir will take his or her share, and not the next-of-kin[1]; and this is so even although the infant has joined with other persons interested, in requesting a sale.[2] The reason is, because the Partition Act 1868[3] creates an equity to effect a reconversion. And so when money is paid into Court under the Lands Clauses Consolidation Act 1845,[4] that is to say, in cases where the parties are under disability, or are limited owners, the same result ensues, and the effect of conversion is prevented. As a further instance, it may be mentioned that under the Lunacy Act 1890,[5] the judge in lunacy may order any property of a lunatic to be sold, mortgaged, dealt with, or otherwise disposed of, in order to raise money for any of the purposes therein mentioned; but it is provided that moneys

Sale in a partition suit.

Sale under Lunacy Act 1890.

[1] *Foster* v. *Foster*, 1 Ch. D., 588; 45 L. J., Ch., 301; *Mildmay* v. *Quicke*, 6 Ch. D., 553; 46 L. J., Ch., 667.

[2] *Norton* v. *Norton* (1900), 1 Ch., 101; 69 L. J., Ch., 31; 81 L. T., 724. If, however, the order for sale directs the infant's share to be paid out to trustees, who have a power of sale, then it is otherwise, for they are deemed to be technically persons absolutely entitled, and the proceeds of the sale will subsequently devolve as personalty. (See *Re Morgan*, *Smith* v. *May* (1900), 2 Ch., 474; 69 L. J., Ch., 735; 48 W. R., 670.)

[3] 31 & 32 Vict., c. 40, sec. 8, which provides that secs. 23-25 of the now repealed Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120) shall apply to moneys received on sales under that Act; and these provisions must be understood as saying that the purchase-money is to be laid out in land to be settled to the same uses. See *Foster* v. *Foster*, *supra*; *Mildmay* v. *Quicke*, 1 Ch. D., 553.

[4] 8 & 9 Vict., c. 18, sec. 69.

[5] 53 Vict., c. 5, sec. 117.

arising from any such sale, which are not applied for the purposes for which the sale was directed, are to belong to the lunatic for the same interest as he would have had if the sale, mortgage, or disposition had not been made, and will be real or personal estate according to the nature of the property so sold, mortgaged, or otherwise dealt with.[1] This provision, however, only applies where property is sold for some of the purposes mentioned in the Act, and has no application when a sale takes place for other reasons or purposes, for there the ordinary effects of conversion take place. Thus, in a recent case,[2] by an order in lunacy certain timber on a freehold estate was directed to be sold, and it was sold accordingly, and the money paid into Court. Both the tenant for life and the remainderman were lunatics, and the question was whether the proceeds of the sale of the timber belonged to the heir-at-law or the next-of-kin of the remainderman. It was held that there having been an order of the Court there was a conversion, and that the next-of-kin were entitled to the money.

Hartley v. *Pendarves.*

Practice of the Court where an order would effect conversion.

Finally, in connection with the matter just dealt with, it should be noticed that in those cases in which a conversion would be effected by an order of the Court, it is open to the Court, by a direction in its order, to prevent such a result ; and it appears to be the practice of the Court usually to give such a direction. The following remarks of an eminent judge will place the matter plainly before the reader :—" There is no law that I am aware of which says that the Court is bound to preserve an infant's estate as realty during infancy ; therefore, if the Court thinks it for the benefit of the infant to

[1] 53 Vict., c. 5, sec. 123.
[2] *Hartley* v. *Pendarves* (1901), 2 Ch., 498 ; 69 L. J., Ch., 745 ; 85 L. T., 64.

sell his estate, it has no hesitation in making an order for sale, and the estate then becomes converted into personalty. And the effect is the same in the case of a purchase. It is, however, the practice of the Court to provide against the consequence of conversion, because it is considered right to do so. The practice in Chancery is to declare the estate purchased out of the infant's money, subject to a charge in favour of his personal estate. That is the practice, but there is no law which obliges the Court to do so."[1]

Reconversion.

The doctrine of reconversion has already been somewhat explained.[2] Any person absolutely entitled to the property in question can reconvert, provided he is solely interested therein and is *sui juris*. If not *sui juris*, then the position is generally the same as has been explained with regard to the doctrine of election.[3] If the person desiring to reconvert is not solely interested, then there is a distinction to be observed according to whether it is money directed to be converted into land, or land directed to be converted into money. If money is directed to be invested in land for the benefit of two or more persons, any one or more of them may elect to take his or their share of the money, for it is evident that no injustice will be done to the other or others thereby, as the residue must produce at least quite as advantageous a property as if the whole had been invested and then divided between the parties.[4] But if land is directed to be sold for the benefit of two or more persons, one or more of them cannot effect a reconversion without the consent of the other or others, for to allow this

Position where two or more interested.

Seeley v. *Jago*.

Holloway v. *Radcliffe*.

[1] Per Jessel, M.R., in *Wallace* v. *Greenwood*, 50 L. J., Ch., at p. 291.
[2] See *ante*, p. 378.
[3] See *ante*, pp. 349-351.
[4] *Seeley* v. *Jago*, 1 P. Wms., 389.

might be injurious to the other or others, in compelling an undivided share or shares to be sold, which, probably, would not produce so much as if the entire estate were sold and the proceeds divided.[1]

What will amount to a reconversion.

As to what will amount to a reconversion, not only may it be made in express terms, but a reconversion may be presumed from circumstances. If money is directed to be invested in land for the benefit of a person, who, instead of requiring the investment to be made, receives the money from the trustees, this is conclusive.[2] If real estate is directed to be sold for the benefit of a person, slight circumstances in the dealing with the property will be sufficient to raise the presumption of a reconversion, though that presumption is liable to be rebutted. Thus, if the person entitled makes a lease of the land,[3] or goes into and remains in possession for a considerable time without attempting to sell,[4] or generally deals with the property as land, *e.g.*, by mortgaging it, all these would be circumstances from which reconversion would be presumed.

Acts showing an intention to reconvert.

Reconversion by operation of law.

In addition to a reconversion taking place by the party's act, it may sometimes arise by construction of the Court, or, as it is said, by operation of law. Where a person has an obligation cast upon him to convert property for certain purposes, which include a benefit to himself, and, before he makes the conversion, the objects fail, so that he is solely interested, and there is no one existing who can compel the conversion to be made, then, as the obligation to convert, and the right to call for the property in question are both in him, the obligation,

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[1] *Holloway* v. *Radcliffe*, 23 Beav., 163 ; *Re Davidson*, 11 Ch. D., 341.
[2] *Wheldale* v. *Partridge*, 8 Ves., 235.
[3] *Crabtree* v. *Bramble*, 3 Atk., 680.
[4] *Dixon* v. *Gayfere*, 17 Beav., 433.

without any act on his part, will be considered as discharged, and the property will be deemed to be, and will devolve on his death, as in its actual state.[1] Thus, if A covenants to invest £10,000 in land to be settled on his wife and children, with an ultimate limitation to himself absolutely, and his wife dies without issue, here he is solely interested. Suppose he, never having bought the land, then dies intestate, the question arises, will his heir be entitled to this £10,000 on the principle of conversion, or will it go to his next-of-kin? It will go to his next-of-kin. The money was at home in A's hands, and he had in himself the determination of its destination, and it is only fair to presume that he would have desired to discharge himself from his obligation, and, as he died silent on the point, the reasonable view to take is that he meant the money to devolve as money, and not as land.

Chichester v. *Bickerstaffe.*

[1] *Chichester* v. *Bickerstaffe*, 2 Vern., 295; *Pulteney* v. *Darlington*, 1 Bro. C. C., 223; *Walrond* v. *Rosslyn*, 11 Ch. D., 640; 48 L. J., Ch., 602.

CHAPTER IV.

APPORTIONMENT AND CONTRIBUTION.

Explanation of the expressions.

APPORTIONMENT and Contribution may be designated as synonymous terms, signifying a division of some benefit, or of some liability. The right to apportionment or contribution was, to some extent, recognised at Common Law, but the remedy was more usually sought in Equity; firstly, because it could be there obtained in some cases unrecognised at Common Law, and, secondly, because the practical course of procedure there was more beneficial.

Apportionment of benefits.

Apportionment, or contribution, may be sought either in respect of some benefit, or of some liability. As to a benefit, if a premium was paid in respect of an apprentice or articled clerk, and the principal became bankrupt before the expiration of the apprenticeship or articles, the Court would decree a return of a portion of the premium. However, now the remedy would be in the bankruptcy, it being provided by the Bankruptcy Act 1883[1] that in such cases application may be made to the trustee of the bankrupt to return a portion of the premium paid, which he may do, his exercise of this discretion being subject to an appeal to the Court. But the Court has no jurisdiction to direct an apportionment of part of a premium by reason of the death of the principal before the expiration of the period of apprenticeship or articles, unless it is expressly provided for by the instrument, or unless the master

No apportionment of premium paid on death of principal.

[1] 46 & 47 Vict., c. 52, sec. 41.

is a member of a firm, and his partners have participated in the premium, and refuse to continue the apprentice or articled clerk.[1]

Apportioning purchase-money between tenant for life and remainderman.

A case of an apportionment of a benefit may sometimes arise with regard to the purchase-money of an estate sold, not by the tenant for life under his statutory powers, but, quite irrespective of them, by the tenant for life and the remainderman in fee simple together, without any agreement having been come to as to how the purchase-money is to be divided. In such a case the rule is that the value of the interest, or estate, of each party, is to be ascertained, calculating that of the tenant for life, according to the common tables respecting the probabilities of life, and then the fund is divided between them.[2]

Apportioning dividends.

Also when trustees receive a dividend after the tenant for life's death, they must pay the proportion thereof, calculated up to the day of the death, to the tenant for life's personal representative under the Apportionment Act 1870.[3] But when trustees properly sell stock *cum* dividend, after a tenant for life's death, to distribute the trust funds among remaindermen, the tenant for life's estate is not entitled to anything in respect of the dividend accruing at his death. The Apportionment Act 1870 does not apply, for the dividend is received by the purchaser and not by the trustees, and it would be unreasonable to throw the burden on the trust estate of ascertaining what should be allowed.[4]

[1] *Whincup* v. *Hughes*, L. R., 6 C. P., 78; 40 L. J., C. P., 104; *Ferns* v. *Carr*, 28 Ch. D., 409; 54 J. L., Ch., 478; 52 L. T., 348. As to the position of a partner who has paid a premium to become a member of a firm, and dissolution then occurring, see Partnership Act 1890, sec. 40; *ante*, p. 173.

[2] Story, 316, and cases there cited.

[3] 33 & 34 Vict., c. 35.

[4] *Bulkeley* v. *Stephens* (1896), 2 Ch., 241; 65 L. J., Ch., 597; 74 L. T., 409.

Apportionment of liabilities.

The power of the Court to direct or arrange apportionment or contribution of liabilities or burdens is more important, and, in most cases of this sort, there was no remedy at Law by reason of the extreme uncertainty that must exist as to ascertaining the relative proportions which different persons had to pay, or if there was a remedy at Law it was less beneficial than in Equity. To illustrate this, suppose a person mortgages his estate for £10,000, and then sells the estate, subject to the mortgage, to six different purchasers in lots of unequal value. In such a case each purchaser is bound to contribute to the discharge of the common burden or charge, in proportion to the value which his lot bears to the whole property included in the mortgage. To ascertain the proper proportion is a matter of great nicety and difficulty, and unless all the different purchasers are joined in a single action, as they could always be in Equity, but not at Law, serious embarrassments might arise in fixing each purchaser's proportion, and in making it conclusive against the others.[1] And even now, since the Judicature Acts, it is evident the Chancery Division is the proper Division of the Court in which to seek redress in such matters, it being a subject for inquiry in chambers.

Illustration.

Re Bird, Dowd v. *Evans.*

To take another illustration of apportionment of a liability, in a recent case it appeared that a trustee had sold consols, and invested the proceeds, in breach of trust, upon an improper security, the amount of which, when realized, was insufficient to replace the capital and pay the arrears of interest. It was held that there must be an apportionment of the sum realized, between capital and income; and that the tenant for life must, upon such apportionment, bring

[1] Story, 310-311.

into account all sums received by him in respect of income on the improper investment beyond what he would have received as dividends on the consols.[1]

Paying off an incumbrance upon an estate.

If an estate is settled, and there is an incumbrance existing upon it, which is paid off by a person having only a limited interest in the estate, a difference sometimes exists as regards the result, according to the position of the person who makes the payment. If the payment off is made by a tenant-in-tail in possession, he being a person who can, by barring the entail, make himself the owner in fee simple, is presumed to have discharged the incumbrance for the benefit of the estate, and the incumbrance will accordingly be extinguished, unless, indeed, he has specially kept it alive by assignment, or by a declaration of his intention. But if a tenant for life, or a tenant-in-tail in remainder, pays off an incumbrance, the rule is different, since neither of such persons can be looked upon in the light of an absolute owner; for, as regards the tenant for life, he has but a very limited interest, and, as regards such a tenant-in-tail, he cannot bar the entail completely at his own will, but only with the consent of the protector of the settlement: therefore, on any payment off by a person occupying such a position, the charge is still kept alive.[2] And where a tenant for life pays off an incumbrance, the mere fact that he is the parent of those entitled in remainder, is not, of itself, sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit.[3] As regards the tenant-in-tail in remainder, however, if he afterwards becomes a tenant-in-tail in possession, and does no act to keep the incumbrance

Tenant-in-tail in possession making payment.

Tenant for life or tenant-in-tail in remainder making payment.

[1] *Re Bird*, *Dodd* v. *Evans* (1901), 1 Ch., 916; 70 L. J., Ch., 514; 84 L. T., 294.

[2] Story, 314.

[3] *Re Harvey*, *Harvey* v. *Hobday* (1896), 1 Ch., 137; 65 L. J., Ch., 370; 73 L. T., 613.

alive, it appears that it will then be deemed to be extinguished; but if he never becomes a tenant-in-tail in possession, the persons interested in his personal estate are entitled to be recouped the amount paid, with interest.

Liability to pay interest on an incumbrance existing on a settled estate.

If an estate is settled, subject to an incumbrance existing thereon, a tenant for life is bound to keep down the interest, and if he dies without having done so, his estate must contribute towards the incumbrance to this extent. A tenant-in-tail in possession may please himself on this point. If he does not pay it, and leaves the estate to descend, the next tenant-in-tail takes it *cum onere*, and cannot call upon his ancestor's personal estate to pay it. If the tenant-in-tail, however, chooses to keep the interest down, and then dies, leaving the estate to descend, the next tenant-in-tail benefits to that extent, and there is no right, on the part of the personal representatives of the deceased tenant-in-tail, to call for repayment of the interest so paid.[1]

Position when tenant for life and remainderman together pay off an incumbrance.

It may, however, happen, in the case of an estate settled subject to an incumbrance, that the incumbrancer calls in his mortgage, or the parties interested wish to pay it off. A plain course is to sell the estate, and out of the proceeds pay off the incumbrance, and, if this is done, then, as to any surplus remaining, the tenant for life will receive the income on that, and at his death it will be paid over to the remainderman. Suppose, however, that the tenant for life and the remainderman do not wish the property sold, but agree themselves to pay off the incumbrance, the question then arises as to how the amount of it is to be apportioned between them. The rule of the Court is that the tenant for life shall contribute in proportion to the benefit he will derive

[1] Story, 315.

from the cessation of the annual payments of interest during his life, a matter which must depend upon his age. If, therefore, the assistance of the Court is sought in such a case, it will be referred to chambers, to ascertain and report what proportion of the amount of the incumbrance the tenant for life ought, upon this basis, to pay, and what ought to be borne by the remainderman.[1]

Contribution between sureties.

A surety who pays his principal's debt has a right to have the amount apportioned between himself and his co-sureties, and contributed to by them in proper proportions; and the leading case of *Dering* v. *Earl of Winchelsea*[2] establishes the general rule that this right exists quite independently of any contract, and has its basis upon principles of Equity. The result of this decision is, that a surety may claim contribution from his co-sureties, though not joined by the same instrument, and though he did not before know that they were sureties[3]; for it is in fact a common burden, and ought to be borne by all of them.

Dering v. *Earl of Winchelsea.*

Rights of sureties to participate in security held by one.

Sureties are not only entitled to contribution *inter se*, but, as a general rule also, they are entitled to call upon any one of their co-sureties who may have obtained from the principal debtor a counter security for the liability he has undertaken, to bring into hotchpot, for the benefit of all the sureties, whatever he may have received from that source. And this is so, even though such other party consented to be a surety only upon the terms of having the security, and the others were, when they entered into the contract of suretyship ignorant of his additional rights.[4]

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[1] Story, 315.
[2] 2 Wh. & Tu., 535.
[3] See *Craythorne* v. *Swinburne*. 14 Ves., 163.
[4] *Steele* v. *Dixon*, 17 Ch. D., 825; Brett's Eq. Cas., 288.

Jurisdiction at Law as to contribution.

Courts of Law entertained actions for contribution between sureties; but the remedy there was often unsatisfactory on account of a right of contribution being claimed against several, and separate actions having to be brought, thus leading to multiplicity of suits. The principle on which the amount of the contribution was arrived at was also unsatisfactory, viz.: that it must be calculated according to the number of sureties originally liable.[1] Thus, suppose A, B, and C were sureties, and A had to pay the whole debt, and it happened that B was a bankrupt, still A could only recover at Law against C one-third of the amount he had paid, and would thus have had himself to probably bear two-thirds. But in Equity the contribution was always made by reference to the number liable at the time of enforcing it, so that in the case just put, A would always in Equity have recovered half the amount from C. At Law, also, it was held that if one surety died, no action could be maintained for contribution against his representatives, but Equity would always enforce such contribution.[2]

The remedy is now equally in either Division.

Such distinctions have, however, ceased to exist since the fusion of Law and Equity, for the Equity rules now prevail[3]; and a surety may get similar contribution, either in the Chancery or the King's Bench Division of the High Court of Justice. But in many cases, to pursue the remedy in the Chancery Division is more appropriate, on account of the machinery of the Court, which enables it to make inquiry in chambers as to the number of sureties and other necessary points in connection with the matter.

[1] *Cowell* v. *Edwards*, 2 B. & P., 268.
[2] *Batard* v. *Hawes*, 2 E. & B., 287.
[3] 36 & 37 Vict., c. 66, sec. 25 (11).

CHAPTER V.

PENALTIES AND FORFEITURES.

Origin and general principles of the doctrine of the Court hereon.

THE origin of the jurisdiction of the Court of Chancery, with reference to granting relief against penalties and forfeitures is obscure, and it is difficult to trace it to any very exact source. It is, however, probable that relief was first granted upon the ground of accident, mistake, or fraud, and was limited to cases where the breach of the condition occasioning the penalty was the non-payment of money at a specified day. The doctrine, no doubt, gradually expanded so as to embrace a variety of other cases,[1] and the general principle of the Court came to be that, whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, that is, as intended only to secure its due performance, or to provide for the damage really incurred by the non-performance.[2] This doctrine forms a good illustration of the maxim, "Equity regards the spirit and not the letter," and the principle is the same as that upon which the Court has always allowed to the mortgagor his equity of redemption.[3]

Relief at law by Statute

But although originally it was only in the Court of Chancery that relief could be obtained against penalties and forfeitures, this has long ceased

[1] Story, 896.
[2] *Sloman* v. *Walter*, 2 Wh. & Tu., 257; *Peachey* v. *Duke of Somerset*, *Ibid.*, 250.
[3] See also *ante*, pp. 10, 185.

altogether to be the case, for by Statute[1] it was provided that, though judgment at Common Law might be obtained for the full amount of a penalty, yet execution should only be issued for the actual damages assessed. And even since the Judicature Acts, the general doctrines on the subject, though equally applicable in the King's Bench Division, yet find their natural home in the Chancery Division, by reason of the necessity which may exist for an injunction, or other special relief most usually sought in that division.

Nature of cases in which the Court relieves.

In all cases of penalties or forfeitures, the great point first to be considered is, whether the breach or non-compliance with the stipulations is of an absolutely essential nature. In all cases of provisions for payment of money, any stipulation for payment of a larger sum, if not paid at the time named, or for forfeiture of any property by reason of non-payment, is always looked upon by the Court as a penalty to secure the performance of the collateral act, and the Court will relieve.[2] Thus, if there is an agreement to sell property, half the purchase-money to be paid down, and the balance on a certain date, with a condition that, if such balance is not paid at that date, the purchaser's interest in the property shall be forfeited and the vendor shall again possess the property, here, though the date is not observed, the Court will look upon the provision as a penalty to secure the collateral act of payment of the balance of the purchase-money, and on payment thereof with interest will relieve.[3] So, again, from a very early time the Court of Chancery granted relief in case of

[1] 8 & 9 Wm. III., c. 11.

[2] *Sloman* v. *Walter*, 2 Wh. & Tu., 257; *Thompson* v. *Hudson*, 4 H. L., 15; 38 L. J., Ch., 435.

[3] *Re Dagenham Thames Dock Company, Ex parte Hulse*, 8 Ch. App., 1022; 43 L. J., Ch., 261.

forfeiture by tenants of their leases by reason of non-payment of rent, upon the principle that the right of entry was intended merely as a security for the debt, and that provided the rent, interest thereon, and all costs were paid, the landlord was put in the same position as if the rent had been paid to him originally. And by the Common Law Procedure Act 1852[1] a similar power of granting relief was conferred on the Courts of Common Law.

Nature of cases in which the Court will not relieve.

But there are many cases in which the performance of the thing is essential, and in which the Court will not relieve. Thus, in *Peachey* v. *Duke of Somerset*,[2] the Court refused to relieve a copyhold tenant who had incurred a forfeiture of his lands, by making leases contrary to the custom of the manor, without the licence of the lord, and by felling timber, digging stones, and putting up hedges, although he offered to make compensation for what he had done. But it was recognised in that case that, had the forfeiture been for non-payment of rent or fines, the Court would have relieved. So, also, although the Court gave relief against a forfeiture for non-payment of rent, yet it would not do so in respect of other covenants, *e.g.*, a covenant to repair, or to insure, or not to assign without licence; and a tenant committing breaches of such covenants was, therefore, absolutely liable to be ejected under the condition of re-entry reserved in the lease. As regards the covenant to repair, however, it was at one time thought that there was a distinction between a general covenant to repair, and a covenant to lay out a specific sum in repairs, and that the Court would relieve in the latter case; but in later

Peachey v. *Duke of Somerset.*

Covenants in leases.

[1] 15 & 16 Vict., c. 76, sec. 212.
[2] 2 Wh. & Tu., 250.

times no such distinction has been observed, and the general rule has been that in neither case, in the absence of some special circumstances, would the Court relieve.[1]

Provisions of Conveyancing Act 1881, as to breaches of covenant.

But with regard to breaches of covenants in leases, it is now provided by the Conveyancing Act 1881[2] that a landlord shall not be entitled to take advantage of breaches of covenants (with the exceptions presently mentioned) by re-entering under a condition of re-entry unless he serves a notice specifying the breach, and, if capable of remedy, requiring it to be remedied, and in any case requiring the lessee to make compensation in money for the breach—if there is anything for which he requires to be compensated[3]—and the tenant within a reasonable time fails to comply with these requirements. Further, the Court has power to give relief against any forfeiture on such terms as it thinks fit, in its discretion, at any time before actual re-entry by the landlord.[4] The exceptions from this provision are: (1) A covenant to pay rent; (2) Covenants against assigning, underletting, or parting with the possession of the property,[5] or a condition for forfeiture on bankruptcy of the tenant, or seizing of his interest in execution[6]; (3) Covenants or conditions in mining leases for the lessor to have access to books, accounts, records, and weighing machines, and to inspect the mine. In these excepted cases, therefore, no previous notice need be

[1] *Hill* v. *Barclay*, 18 Ves., 62; *Bracebridge* v. *Buckley*, 2 Price, 200.
[2] 44 & 45 Vict., c. 41, sec. 14. See certain amendments of this provision in the Conveyancing Act 1892 (55 & 56 Vict., c. 13), secs. 2 and 4.
[3] *Lock* v. *Pearce* (1892), 2 Ch., 328; 61 L. J., Ch., 606; 67 L. T., 164.
[4] *Rogers* v. *Rice* (1892), 2 Ch., 170; 61 L. J., Ch., 573; 66 L. T., 640.
[5] *Barrow* v. *Isaacs* (1891), 1 Q. B., 417; 60 L. J., Q. B., 179; 64 L. T., 686.
[6] Except to the extent provided for by the Conveyancing Act 1892 (55 & 56 Vict., c. 13), sec. 2.

given, or is necessary, as in other cases; and as regards the last two exceptions, the general rule[1] remains the same as ever, viz.: that the Court cannot relieve on the breach of such covenants; but as regards the covenant for payment of rent, irrespective of this enactment, the Court has full power to relieve, as has been pointed out.[2]

Provisions for forfeitures bad in themselves.

Some provisions for forfeiture are in themselves bad, as if the thing to be performed, and which if not performed is to be the cause of the forfeiture, is in itself illegal. And a condition that if a tenant for life attempts to sell, or lease the property under the provisions of the Settled Land Act 1882, his estate shall be forfeited, or shall go over to another, is absolutely void.[3]

Distinction between penalties and forfeitures.

From what has been stated, it is plain that there is a distinction taken by the Court between a penalty strictly so called, and a forfeiture of estate or interest, as distinguished from a penalty. In the former case, relief is always given if compensation can be made, whilst in the latter, though compensation can be made, yet relief is not always given.[4] Thus, take even now a forfeiture for a breach of a covenant by a lessee not to assign, the Court will not relieve, though really the landlord has not been damaged.[5] It is difficult to see the ground for the distinction, but, most probably, the idea of giving relief was, in the first instance, only adopted in the case of penalties and forfeitures for the breach of

[1] Qualified by the Conveyancing Act 1892 (55 & 56 Vict., c. 13), secs. 2, 4.

[2] See fully as to forfeiture of leases and relief, Indermaur & Thwaites' Conveyancing, 405-414.

[3] 45 & 46 Vict., c. 38, sec. 51. *Re Ames*, *Ames* v. *Ames* (1893), 2 Ch., 479; 62 L. J., Ch., 685; 68 L. T., 787.

[4] Story, 902.

[5] *Barrow* v. *Isaacs* (1891), 1 Q. B., 417; 60 L. J., Q. B., 17 64 L. T., 685.

pecuniary covenants and conditions, and judges have been loth to extend it, considering it a dangerous principle, and indeed its policy generally has been much questioned.[1]

Special circumstances sometimes enabling the Court to interfere.

But, notwithstanding that there are many cases in which primarily the Court will not give relief, there may sometimes be special circumstances which will enable the Court to do so, or will induce the Court to interfere to prevent advantage being taken of the forfeiture or penalty. These special circumstances may be either accident, fraud, mistake, or acquiescence. If either by unavoidable accident, by fraud, surprise, or ignorance, a party has been prevented from performing a covenant literally, the Court will interfere, and relieve on compensation being made.[2] Thus, a person will not be allowed to take advantage of a forfeiture brought about by his own act, as where a landlord has by his conduct misled his tenant into supposing that a certain covenant would not be insisted on.[3] And where there has been long acquiescence in a breach of covenant, the landlord cannot proceed to enforce a forfeiture.[4]

Penalty or liquidated damages.

A difficulty sometimes arises on a contract, in determining whether a sum which is agreed to be paid on breach is a penalty, or whether it is a sum considered between the parties and fixed as liquidated damages; for if it really is the latter, then the whole amount can be recovered on breach, and the Court will not relieve. But the mere fact that the parties in their agreement style the amount to be paid as liquidated damages, does not conclude

[1] Story, 903.
[2] See 2 Wh. & Tu., 280.
[3] *Hughes* v. *Metropolitan Railway Company*, L. R., 2 App. Ca., 439; 46 L. J., C. P., 583.
[4] *Gibson* v. *Doag*, 6 W. R., 147; Story, 908.

the matter, for the Court will not allow its jurisdiction to be evaded merely by the fact, or because the parties have designedly used language, and inserted provisions, which are in their nature penal, and yet have endeavoured to cover up and disguise their objects.[1] The question, indeed, of penalty or liquidated damages, depends on the construction to be placed on the whole instrument taken together,[2] though some general principles may be laid down to assist in arriving at that construction, of which we may mention two chief ones.

First general principle to assist in arriving at conclusion.

1. Where a sum of money is stated to be payable, either by way of liquidated damages, or by way of penalty, for breach of stipulations, all or some of which are, or one of which is, for payment of a sum of money of less amount, the former sum of money is really a penalty, and the actual damage only can be recovered, as the Court will not sever the stipulations.[3] Thus, where an actress was, by the contract of engagement, to act at a theatre, and to be paid a fixed weekly salary, and she subjected herself to the payment of certain fines and forfeitures, and it was agreed that on breach on either side £200 should be paid, it was held that this was a penalty.[4]

Second general principle.

2. But where the damage for the breach of stipulations is unascertainable, or not readily ascertainable, and there is a sum agreed to be paid on breach of any or either of them, then the sum is treated as liquidated damages,[5] and this notwithstanding that

[1] Story, 901.
[2] *Wallis* v. *Smith*, 21 Ch. D., 243; 52 L. J., Ch., 145; Brett's Eq. Cas., 63.
[3] 2 Wh. & Tu., 268.
[4] *Astley* v. *Weldon*, 2 B. & P., 346; and see *Kemble* v. *Farren*, 6 Bing., 141.
[5] Even if called a penalty in the contract, *Re White & Arthur* (1901), 84 L. T., 594.

there are several stipulations, and some of them may be of greater, and some of less importance.[1] Still, this rule is to be carried out with limitations, for, although a good general principle, it may amount to great hardship in some cases, and so much so that the Court cannot consider the payment of the sum to be the real design.

Person cannot avoid a contract by paying a sum of money provided to be paid on breach.

Where a person contracts not to do an act, and if he does it to pay a certain sum of money, or, that if he omits to do an act he will pay a certain sum of money, he cannot elect to do the act, or omit to do it, and pay the amount; and this is so whether the amount is a penalty or liquidated damages. In such a case the Court will interfere by injunction to prevent the doing of the act the party has agreed not to do, or will compel specific performance of the act he has agreed to do, if it is a proper case for the Court to do so.[2] Thus it is an ordinary condition of sale that if the purchaser does not comply with the conditions, he shall forfeit his deposit, but still the purchaser has no right to elect to not carry out the purchase but, instead, to avoid the contract and forfeit his deposit.

London and Yorkshire Banking Company v. *Pritt.*

In one case, the defendant, having been appointed by the plaintiffs their bank manager at Leeds, executed a bond with a penalty of £1,000 to the plaintiffs, conditioned to be void if the defendant, after quitting the plaintiffs' employ, should not enter into similar employ, within a certain specified time and distance. The defendant, having committed a breach of the condition, contended that the plaintiffs' only remedy was to recover the monetary penalty reserved by the bond; but the Court held that the

[1] *Kemble* v. *Farren*, 6 Bing., 141; per Jessel, M.R., in *Wallis* v. *Smith*, 21 Ch. D., 258; 52 L. J., Ch., 149; *Ward* v. *Monaghan*, 59 J. P., 532.

[2] *French* v. *Macale*, 2 D. & War., 274; *City of London* v. *Pugh*, 4 Bro. C. C. Toml. Ed., 395.

condition of the bond was evidence of an agreement not to do the thing in question, and granted an injunction.[1]

Unless it is distinctly alternative.

But care must be taken to distinguish cases coming within the principle just mentioned from that class of cases in which there is a contract not to do a certain thing except subject to certain payments. In such cases, the intention of the parties is that one of them shall either do, or refrain from doing, a particular thing, or, as an alternative, make a certain payment, and if a party chooses the alternative, the Court will not interfere, either by way of specific performance or injunction. Thus, where a lessee covenanted not to plough up the ancient meadow or pasture ground, and if he did that he would pay an additional rent of £5 an acre, it was held that he could, if he liked, plough it up, but that if he did he must pay the extra rent.[2]

[1] *London and Yorkshire Bank* v. *Pritt*, 56 L. J., Ch., 987; 57 L. T., 875; *National Prov. Bank* v. *Marshall*, 40 Ch. D., 112; 58 L. J., Ch., 229; 60 L. T., 341.

[2] *Rolfe* v. *Peterson*, 2 Bro. C. C. Toml. Ed., 486; *Woodward* v. *Gyles*, 2 Vern., 119.

CHAPTER VI.

MARRIED WOMEN.

The doctrines of the Court as to married women are all in connection with their property.

THE various peculiar doctrines of the Court of Chancery with reference to the subject of married women all have reference to their property, and it will, therefore, in the first place, be necessary to consider their position and rights with regard to their property at Common Law, both as it was and as it now is.

Position as to wife's property at Common Law.

At Common Law, as regards the freeholds of the wife, the husband had a right to take the rents and profits thereof during coverture, and if he had issue by her, born alive and capable of inheriting, he had an estate for his own life by the curtesy. The inheritance, however, was in the wife; and this could be disposed of by the husband and wife together, at first by means of a fine, but after 1833, under the Fines and Recoveries Act,[1] by deed acknowledged, she being separately examined before a Judge or two Commissioners[2]; and on her death, subject to the husband's curtesy, the land went to her heir. As regards her leaseholds, they vested absolutely in the husband, and he could dispose of them in any way except by will; if the husband died first, and did not dispose of them during his lifetime, they survived to her. As to her other personalty, if that consisted of *choses in possession*, they vested absolutely in the husband, but if of *choses in action* it was necessary for the husband to

[1] 3 & 4 Wm. IV., c. 74, sec. 70.

[2] One Commissioner was made sufficient by the Conveyancing Act 1882 (45 & 46 Vict., c. 39, sec. 7).

reduce them into possession, *e.g.*, by recovering judgment and issuing execution, and if he failed to reduce them into possession, they survived to the wife. If he, however, survived her, he took all her personalty, including leaseholds.

The Married Women's Property Act 1870.

This position was to some extent altered by the Married Women's Property Act 1870,[1] as regards any woman who married on or after 9th August, 1870. By that Statute it is provided[2] as to her freeholds, that if they *descend* to her, the rents and profits shall be to her separate use. As to her personalty (which term, of course, includes leaseholds), it provides[3] that if she takes it as next-of-kin it shall be to her separate use; and there is a similar provision[4] as to any sum of money, not exceeding £200, coming to her under a deed or will.

The Married Women's Property Act 1882.

But this position has been still further altered by the Married Women's Property Act 1882,[5] which came into operation on 1st January, 1883. There are two distinct provisions of that Statute to be noticed here. It provides, firstly,[6] that as regards a woman who gets married after it came into operation, all property which she possesses at the time of her marriage, and which she subsequently acquires, shall be to her separate use; and secondly,[7] that as regards a woman who got married before its commencement, all property, her title to which accrues after the commencement of the Act, shall be to her separate use. On this provision it has been decided that there can be but one accrual of title, so that where a woman married before the Act was entitled before the Act to property in reversion or

Reid v. *Reid.*

[1] 33 & 34 Vict., c. 93.
[2] Sec. 8.
[3] Sec. 7.
[4] Sec. 7.
[5] 45 & 46 Vict., c. 75.
[6] Sec. 2.
[7] Sec. 5.

remainder, which then falls into possession on or after the 1st January, 1883, that is not property which has accrued to her since the Act. It accrued to her at the original date of her acquirement of it, and the mere fact of its changing from a reversionary property into an estate in possession is not an accrual of title.[1]

Fraud on husband's marital rights.

The husband's rights, therefore, in his wife's property during her lifetime have been almost entirely swept away. But formerly they were manifestly very considerable, and the rights he acquired by marriage gave rise to a doctrine of the Court in his favour, known as a Fraud on the husband's marital rights. This doctrine was, that if a woman engaged to be married made a settlement or other disposition of her property secretly, without notice to the intended husband, it operated as a fraud on him, and would be set aside.[2] The husband was considered as having a right to expect that, after the contract to marry, no change should be made in the lady's position, without his being apprised of it. And the rule prevailed even though the settlement, or other disposition, was not immediately before marriage, and though the husband did not know of the wife being possessed of the property, and though a considerable time had elapsed after the marriage before proceedings were taken to set it aside[3]; provided he had not been guilty of laches, and provided also that his right was not defeated by the countervailing equity of a *bonâ fide* purchaser for

[1] *Reid* v. *Reid*, 31 Ch. D., 402; 55 L. J., Ch., 294; Brett's Eq. Cas., 114. The case of *Re Parsons*, *Stockley* v. *Parsons*, 45 Ch. D., 51; 59 L. J., Ch., 666; 62 L. T., 929; should be compared with *Reid* v. *Reid* and distinguished. That was a case of a married woman having merely a *spes successionis* before 1st January, 1883, and it became an actual estate or interest after that date, and it was held that the property was to her separate use.

[2] *Countess of Strathmore* v. *Bowes*, 1 Wh. & Tu., 613.

[3] *Goddard* v. *Snow*, 1 Russ., 484.

value having the legal estate. But if the settlement was made with notice to the then intended husband, it was good, so that, in such a case, where the woman, directly after making the settlement, broke off the engagement, and married another man, who knew nothing of the settlement, it was held that he could not set it aside, for it was no fraud upon him, not having been made during the engagement with him.[1] *Countess of Strathmore* v. *Bowes.*

And, although a settlement or disposition by a woman engaged to be married might be a moral and righteous one, yet the Court would not permit her thus to defeat her husband's expectations; so that even a secret provision by her for children of a former marriage could not have been supported.[2] But, where a man had seduced the woman he was engaged to be married to, and she then secretly made a reasonable settlement of her property, the Court refused to set it aside in favour of the husband, upon the ground that he had, by his conduct, practically prevented her from retiring from the marriage, and had put it out of her power effectually to make any stipulation for the settlement of her property.[3] A settlement though morally righteous not usually allowed to defeat husband.

It may, perhaps, be considered that as a woman who marries on or after 1st January, 1883, will, under the Married Women's Property Act 1882,[4] be entitled to her property, at and after her marriage, to her separate use, the right of the husband to set aside a settlement made by the wife can no longer be enforced, since the marital right of the husband, to protect which the rule was enforced, has by this The doctrine of fraud on husband's marital right appears not to exist now.

[1] *Countess of Strathmore* v. *Bowes*, 1 Wh. & Tu., 613.
[2] 1 Wh. & Tu., 618.
[3] *Taylor* v. *Pugh*, 1 Hare, 608.
[4] 45 & 46 Vict., c. 75.

Act been almost, in effect, abolished.[1] Yet, in the absence of express decision, this cannot be taken as definite law, for it must be remembered that on the death of his wife intestate, the husband has certain rights, viz. :—A life estate by curtesy out of her real estate,[2] and the absolute ownership of her personal estate.[3] It may, therefore, with some show of reason, be argued, that a husband has even now such an interest in his wife's property as would still render a secret disposition by her, pending the engagement, a fraud upon him. Again, it may be argued that though he has no actual rights as husband during her life, yet he has the moral powers and rights of husband, and that the doctrine is not founded merely upon his strict legal rights. Still, if a woman, directly she is married, can now—as she undoubtedly can—dispose of all her property without her husband's consent or knowledge, it is certainly strange if she cannot do so before she actually marries.

Separate estate.

The fact of the husband's great control over, and interest in, his wife's property at Law, gave rise in Equity to the doctrine of separate estate, that is an ownership of property by a married woman apart from her husband, for her exclusive use. It was at first considered necessary that any property which a wife was to have for her separate estate must be vested in trustees for her benefit; but it was afterwards established that this was not essential, and that whenever either real or personal property was

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[1] See Vaizey's Settlements, 1581 ; 1 Wh. & Tu., 616.

[2] *Cooper* v. *Macdonald*, 7 Ch. D., 288 ; 47 L. J., Ch., 373. This right to curtesy is not affected by the Married Women's Property Act 1882 (*Hope* v. *Hope* (1892), 2 Ch., 336 ; 61 L. J., Ch., 441 ; 66 L. T., 522). See further hereon, *post*, p. 438.

[3] 29 Car II., c. 3, sec. 24 ; *Re Lambert's Estate*, *Stanton* v. *Lambert*, 39 Ch. D., 626 ; 57 L. J., Ch., 927 ; 59 L. T., 429. See also *post*, pp. 438, 439.

given to a married woman for her separate use, even though there were no trustees, yet effect should be given to the intention of the parties, for, "Equity never wants a trustee." The Court, therefore, the intention being manifest, followed the legal estate, or possessory interest, into the husband's hands, and compelled him to hold as a trustee for his wife.[1]

What words will create separate estate.

In order to create separate estate for a married woman, no particular formal or technical expressions were necessary, but any words were held to be sufficient which showed an intention to exclude the husband from any interest in the property. The most apt words were "to her sole and separate use," but many other expressions were held sufficient, *e.g.*, "to her sole use and benefit"; "for her own use, and at her own disposal"; "to her own use during her life independently of her husband."[2] A gift to a woman for her "sole benefit" has, however, been held not, by itself, sufficient to make the property to her separate use,[3] but if the property was given in this way to trustees for her, then such words were usually sufficient[4]; and if, when the gift was made, the woman was already married, or her marriage was then in contemplation, a gift for her "sole benefit" was held to show a sufficient intention to exclude the husband, and to create a separate estate.[5]

Clause against anticipation.

The establishment by the Court of Chancery of the right of a woman to have property so settled upon herself that she should hold it apart from any husband, was not sufficient in itself to afford that real protection which was desirable, for there was

[1] Story, 948.
[2] *Ibid.*, 949.
[3] *Massy* v. *Rowen*, L. R., 4 H. L., 288.
[4] *Gilbert* v. *Lewis*, 1 De G. J. & S., 38.
[5] *Ex parte Ray*, 1 Madd., 199; *Re Tarsey's Trusts*, L. R., 1 Eq., 561; 35 L. J., Ch., 452.

always the very likely event to be considered, that she would hand the property over to her husband, either by reason of his persuasion or his threats. To protect her, therefore, against the influence and control of her husband, the Court held that a clause might be inserted in the settlement, or will, restraining her from anticipating or alienating her separate property, whether real or personal, and whatever might be her interest therein, whether absolute or for life only.[1] The effect of this clause was fully considered in the leading case of *Tullett* v. *Armstrong*,[2] where it was laid down that both the separate use clause, and the restriction against anticipation, are practically only applicable during marriage; that if property is given to a then unmarried woman, these provisions become effectual on subsequent marriage; that the anticipation clause can only be annexed to separate estate; and that neither clause can have any effect, during widowhood, but that they can revive on a subsequent marriage, if apt words are used. Where the anticipation clause exists, the married woman can only receive the income of the property as and when it becomes due, and she has no power whatever to give valid receipts for money paid in advance, or—except in so far as there have been any statutory modifications[3]—to charge, or otherwise dispose of, or release either the property itself, or the future income thereof, and the doctrine of estoppel cannot even be applied to prevent the strict operation of the anticipation clause.[4]

Tullett v. *Armstrong*.

The anticipation clause is subject to the perpetuity rule.

This anticipation clause is clearly an invention of the Court for the purpose of protecting married

[1] 1 Wh. & Tu., 709.
[2] 1 Beav., 1, subsequently affirmed on appeal, 4 My. & Cr., 405.
[3] As to which, see *post*, pp. 435, 436.
[4] *Lady Bateman* v. *Faber* (1898), 1 Ch., 144; 67 L. J., Ch., 130; 77 L. T., 576.

women, and it must be regarded as an exception to the ordinary doctrine and policy of the law, that property shall not be rendered inalienable. But although this exception exists, it must be borne in mind that it is subject to the rule against perpetuities, and that any direction against anticipation which may exceed the perpetuity rule is bad, that is to say, if the direction against anticipating may extend beyond a life or lives in being and twenty-one years afterwards, effect will not be given to it. Thus, a testator gave a sum of £4,000 to trustees in trust for his niece, and after her decease for her child or children living at her death, and the issue of any who should have predeceased her, and he directed that the shares of any female legatees should be for their separate use without power of anticipation. At the death of the niece her only children (two married daughters) presented a petition to the Court for payment out to them of the whole fund, which was in Court, and the Court made the order, deciding that the restraint against anticipation was void as possibly exceeding the perpetuity rule.[1]

Re Ridley, Buckton v. *May*.

Whenever property is held by a woman for her separate use, then, provided there is no clause restraining her from anticipating, she has always been able, in Equity, to dispose of it by deed or will, as if she were a *feme sole*, and this whether the property so settled was real or personal, in possession or in reversion.[2] With regard, however, to real

Power to dispose of separate property.

[1] *Re Ridley*, *Buckton* v. *May*, L. R., 11 Eq., 649 ; 48 L. J., Ch., 563. And see *Armitage* v. *Coates*, 35 Beav., 1 ; *Re Michael's Trusts*, 46 L. J., Ch., 651 ; *Herbert* v. *Webster*, 15 Ch. D., 610 ; 49 L. J., Ch., 620. In this last-mentioned case a sum was settled in trust for present and future children, in equal shares, with a restraint on anticipation of daughters' shares, and some daughters were *in esse*, and in order to carry out the intention with regard to these, and avoid the rule against perpetuities, the gift was read as of the shares separately.

[2] *Fettiplace* v. *Gorges*, 1 Ves., Jun., 46 ; *Taylor* v. *Meads*, 34 L. J., Ch., 203 ; *Sturges* v. *Coep*, 13 Ves., 190.

property given to her for her separate use without the intervention of trustees, the legal estate would devolve on the husband, and though the wife could by herself dispose of the equitable or beneficial interest, yet to pass the legal estate it would be necessary for the husband to join, and for the deed to be acknowledged.[1]

Position now under the Married Women's Property Act 1882.

At the present day, by reason of the Married Women's Property Act 1882,[2] if it is simply desired that a woman shall enjoy property for her separate use, there is no occasion to express that, or to give the property to her through trustees, for it must be to her separate use without any words being annexed to it to make it so; and as, under this Act, she is to be in the same position with regard to her property as if she were a *feme sole*, it follows that by virtue of its provisions she can dispose of her estate or interest, in all kinds of property which by it are to her separate use, in the same manner as she could do if unmarried.[3] Thus, she can enlarge a base fee into a fee simple absolute, without any acknowledgment, and without her husband joining.[4] It is evident, therefore, that any lengthened consideration of the subject of the creation of separate estate by contract, settlement, or will, with the various distinctions on different points arising therefrom, cannot be of general practical use, having, as it would, only reference to the past, and not to the present or future. But the Married Women's

[1] *Taylor* v. *Meads*, 34 L. J., Ch., 203.

[2] See *ante*, p. 417.

[3] The Act does not, however, apply to property which she holds on an active trust, and here on any sale her husband must join, and she must acknowledge the deed (*Re Harkness & Allsopp's Contract* (1896), 2 Ch., 358; 65 L. J., Ch., 726; 74 L. T., 652). But she can alone convey property she only holds as a bare trustee (56 & 57 Vict., c. 53 (Trustee Act 1893), sec. 16). And see Indermaur & Thwaites' Conveyancing, 65, 66.

[4] *Re Drummond & Davies* (1891), 1 Ch., 524; 60 L. J., Ch., 258; 64 L. T., 246.

Property Act 1882 simply gives a woman her property for her separate use, and if it is desired that she shall not have a full disposing power over it, it is still necessary to give the property to her expressly without power of anticipation. It would also manifestly be advisable, in such a case, to vest the property in trustees for the married woman.

As to the anticipation clause.

Although, formerly, for the clause against anticipation to have had any effect, the property must have been expressly given to the woman's separate use, it being an equitable creation incapable of being annexed to a legal interest, it has been decided that now, since the Married Women's Property Act 1882, there is not any necessity for such words, for, as all property is, without it being so stated, to be for a married woman's separate use, it follows that all that is necessary is simply to provide against anticipation, the separate use clause being, in effect, provided by the Statute.[1] When property is given to a married woman without power of anticipation, the effect is, as already stated, that she can simply receive the rents, profits, or other income thereof, as and when they become due, and she cannot dispose of, or in any way deal therewith, until that time; but, naturally, when that time arrives she can, for the clause then ceases to have any further application. And though interest is ordinarily deemed as accruing due *de die in diem*, a married woman, upon whom the fund out of which it proceeds is settled to her separate use without power of anticipation, cannot effectually assign an apportioned part of the interest up to the date of the assignment, but can only deal with the interest after it has become payable.[2]

Re Lumley.

[1] *Re Lumley, Ex parte Hood-Barrs* (1896), 2 Ch., 690; 65 L. J., Ch., 837; 75 L. T., 236.
[2] *Re Brettle*, 2 De G. J. & S., 79.

Judgment and execution.

A judgment and execution issued and put in force thereon, operate by way of involuntary alienation of a debtor's property; and the question has arisen as to the rights of a judgment creditor against a married woman's separate estate settled on her without power of anticipation. It has been decided that the judgment creditor can attach any income actually due and payable at the time of his judgment,[1] but not subsequent income, even when it becomes due and payable.[2] The Married Women's Property Act 1893, however, provides that, in any action or proceeding instituted unsuccessfully by a married woman, the Court may order the costs of the opposite party to be paid out of property she is restrained from anticipating, and may enforce payment by appointment of a receiver, and sale of the property, or otherwise.[3]

Hood-Barrs v. *Heriot.*

Whiteley v. *Edwards.*

Costs.

Ante-nuptial debts.

With regard to debts and other liabilities created by a woman before marriage, the Married Women's Property Act 1882[4] provides that after her marriage she shall continue liable therefor to the extent of her separate property, and that she cannot, by settling her property upon herself without power of anticipation, deprive her ante-nuptial creditors of their rights.[5]

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[1] *Hood-Barrs* v. *Heriot* (1896), A. C., 174; 65 L. J., Q. B., 352; 74 L. T., 353. In the case of *Collyer* v. *Isaacs* (*Law Times Newspaper*, 28th August, 1897), where the plaintiff has got an order for judgment against a married woman, but had deferred actually signing judgment until a later date when income had accrued due, the Court of Appeal held that the income could not be attached, because it was not due at the date of the order for judgment.

[2] *Whiteley* v. *Edwards* (1896), 2 Q. B., 48; 65 L. J., Q. B., 457; 74 L. T., 720; approved by House of Lords in *Bolitho* v. *Gidley* (1905), A. C., 98; 74 L. J., K. B., 430; 92 L. T., 369.

[3] 56 & 57 Vict., c. 63, sec. 2; and see hereon *Moran* v. *Place* (1896), P., 214; 65 L. J., P., 83; 74 L. T., 661; *Hood-Barrs* v. *Heriot* (1897), A. C., 177; 66 L. J., Q. B., 356; 76 L. T., 299; *Crickitt* v. *Crickitt* (1902), P., 177; 71 L. J., P., 65; 86 L. T., 635; *Gordon* v. *Gordon* (1904), P., 163; 73 L. J., P., 41; 90 L. T., 597.

[4] 45 & 46 Vict., c. 75, secs. 13, 19.

[5] See *Re Hedgeley*, *Small* v. *Hedgeley*, 34 Ch. D., 479; 56 L. J., Ch., 360; 56 L. T., 19; *Jay* v. *Johnstone*, 25 Q. B. D., 467; 59 L. J., Q. B., 367; 63 L. T., 174.

Bankruptcy.

The anticipation clause is manifestly sometimes a means of protecting a married woman from being compelled to pay her just debts, a state of the law which does not appear at all satisfactory. Furthermore, to the great detriment of creditors, the anticipation clause is also a protection to a married woman in the event of her bankruptcy, for, as bankruptcy is involuntary alienation, it follows that if she becomes a bankrupt,[1] future accruing income cannot be claimed by the trustee in her bankruptcy. If, however, a bankrupt married woman becomes a widow before she gets her discharge, then her income can at once be claimed by the trustee, for the anticipation clause has then ceased to be effectual[2]; and it would appear, in such a case, that the title of the trustee will not be divested by the lady marrying again.

Re Wheeler.

Married woman joining in breach of trust.

If a married woman concurs with her trustees in committing a breach of trust, which results in the loss of her separate use property, she will be held to have disposed of it, and cannot call upon her trustees to replace it.[3] If, however, it was settled on her without power of anticipation, then it was formerly held to be otherwise.[4] And although, ordinarily, the income of property settled to the separate use of a married woman is liable to make good a loss occasioned by her own breach of trust in making away with other property under the trust, yet, if there is a clause against anticipation, future income will not be so liable.[5] The Trustee Act 1893,[6]

[1] Every married woman carrying on a trade separately from her husband is, in respect of her separate property, subject to the bankruptcy laws as if she were a *feme sole*, 45 & 46 Vict., c. 75, sec. 1 (5).

[2] *Re Wheeler's Settlement Trust* (1899), 2 Ch., 717; 68 L. J., Ch., 333; 81 L. T., 72; 48 W. R., 10.

[3] *Crosby* v. *Church*, 3 Beav., 485.

[4] *Davies* v. *Hodgson*, 25 Beav., 186.

[5] *Clive* v. *Carew*, 1 J. & H., 199.

[6] 56 & 57 Vict., ~~c. 45~~, and see *ante*, p. 106.

c 53. s. 45 (1).

however, now provides that when a trustee commits a breach of trust at the instigation, or request, or with the consent in writing, of a beneficiary, the Court may, even if the beneficiary is a married woman entitled for her separate use without power to anticipate, impound all or any part of the beneficiary's interest to indemnify the trustee, or any one claiming through him. The Court, therefore, being able to impound the beneficiary's interest, would not now, it is apprehended, give relief against the trustee at the instance of such a beneficiary, who has consented in writing to, or has instigated, or requested, the breach of trust which has been committed.

Gift of capital to a married woman without power of anticipation.

If a sum of stock or money is given absolutely to a married woman, and there is a provision restraining her from anticipation, it is sometimes difficult to determine the exact effect of the gift. A distinction has in some cases been drawn according to whether the fund happens to be an incoming-bearing fund or not, but this distinction cannot now be maintained as definitely settling the point.[1] Thus, if a sum of stock is bequeathed to a married woman with a clause restraining her from anticipation, she can generally only receive the income, and cannot call for the capital, the words having the effect, practically, of giving her a perpetual annuity, which she can, however, only receive as and when it becomes due, and cannot absolutely dispose of, except by her will.[2] But if a sum of money is bequeathed to a married woman with a clause restraining her from anticipation, then it was formerly considered that such clause was always ineffectual, as there being no

[1] Per Cotton, L.J., *Re Bown*, *O'Halloran* v. *King*, 27 Ch. D., 422; 53 L. J., Ch., 881; 50 L. T., 796.

[2] *Re Ellis's Trust*, L. R., 17 Eq., 409; *Re Benton*, *Smith* v. *Smith*, 19 Ch. D., 277; 51 L. J., Ch., 183; 45 L. T., 786.

income coming in, there would, if effect were given to it, be nothing for her to receive.[1] It must, however, be considered as now settled that there is not necessarily any such distinction, and, indeed, it seems very strange for the Court ever to have made the validity of the anticipation clause turn entirely on the accident whether, at the time, the money was in cash or was invested, for that is what it really came to. The correct view must now be taken to be that laid down in *Re Bown, O'Halloran* v. *King*,[2] viz.: that the clause against anticipation *may* be equally good in either case, the question turning entirely upon the intention of the testator as shown in his will, *i.e.*, has he declared an intention that the money should be paid to the married woman, or that only the income should be paid to her from time to time, and, if the latter is the true construction, she would only enjoy the fund as an annuity, and not as a capital sum of money.[3] The intention to tie up the property must, however, be clearly expressed, and, as a general rule, where there is a gift to a married woman without power of anticipation, *if there is no further indication that the income only is to be paid to her during coverture*, the clause against anticipation will be rejected and the *corpus* paid over to her.[4] And where there is a gift of the capital or *corpus* of property to a married woman at a future date, *e.g.*, the death of a life tenant of the fund, a clause against anticipation is construed as applicable only to the interval between the death of the testator and the future period, and will not prevent the married woman from calling for

Not necessarily any distinction whether the fund is one producing income or not.

Re Bown, O'Halloran v. *King*.

Re Fearon.

Effect of anticipation clause when annexed to an absolute gift payable *in futuro*.

[1] *Re Clarke's Trusts*, 21 Ch. D., 748; 51 L. J., Ch., 855; 47 L. T., 43.

[2] 27 Ch. D., 411; 53 L. J., Ch., 881; 50 L. T., 796.

[3] Per Cotton, L.J., in *Re Bown, O'Halloran* v. *King*, 27 Ch. D., at p. 422; 53 L. J., Ch., at p. 884; *Re Grey's Settlements*, 34 Ch. D., 712; 56 L. J., Ch., 511; 1 Wh. & Tu., 710, 711; Brett's Eq. Cas., 124.

[4] *Re Fearon, Hotchkin* v. *Mayor*, 45 W. R., 232.

Re Bown, O'Halloran v. *King.*

a transfer of the fund on the death of the tenant for life. Thus, where a sum was directed to be invested upon trust for one for life, and then at his death a portion of the fund was given to a married woman for her separate use, without power of anticipation, it was held that the effect of the clause was only to prevent the married woman anticipating, or alienating, the fund during the lifetime of the tenant for life, and that on his death the restraint entirely ceased, and she was absolutely entitled to call for the whole amount given to her, and was not compelled simply to receive the income as and when it became due from time to time.[1]

Provision of Conveyancing Act 1881, sec. 39.

The clause against anticipation, though invented for the benefit of married women, has been found in certain cases to work hardly, and inconveniently, and to their detriment.[2] It has, therefore, been provided by the Conveyancing Act 1881,[3] that when a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. This provision does not mean that the Court has a general power of removing the restraint on anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit. Thus, in one case, property had been settled upon trust to pay the income to the wife for life, without power of anticipation, and then to the husband for life, if surviving, then to the children of the marriage, and in default of children, for the husband absolutely. The parties had been married twenty-eight years without having any children, and

Re Warren's Settlement.

[1] *Re Bown, O'Halloran* v. *King*, 27 Ch. D., 411 ; 53 L. J., Ch., 881 ; 50 L. T., 796 ; *Re Holmes, Hallows* v. *Holmes*, 67 L. T., 335.

[2] See *Robinson* v. *Wheelwright*, 6 De G., M. & G., 535; *ante*, p. 350.

[3] 44 & 45 Vict., c. 41, sec. 39.

there was medical evidence that it was almost impossible for the lady to have any issue. Yet the Court of Appeal declined to remove the restraint on anticipation.[1] But, to enable a woman to make some particular disposition which is for her benefit, the Court has undoubtedly in some cases taken a very liberal view of this enactment, dealing with it in a practical light, and removing the clause at her request, when it has been clearly shown that a direct benefit to her is likely to result by doing so. Thus, *Re Torrance.* in one case, a woman was entitled to a considerable reversionary property for her separate use, without power of anticipation. Her husband was a medical man, and wished to purchase a practice, and the wife applied to have the restraint removed, so that money could be raised on her property for the purchase. The Court acceded to the application, it being shown that the practice was a substantial one, and the transaction was likely to be for the woman's benefit.[2] In another *Hodges* v. *Hodges.* case, the Court removed the anticipation clause, for the purpose of enabling a married woman to raise money to pay her debts.[3] However, *Re Pollard's Settlement.* the Court will by no means always do this; thus, in one case the Court of Appeal distinctly refused to so act, on the ground that the debts had been contracted improvidently.[4] In fact, the tendency of the most recent decisions is somewhat the reverse of the earlier ones, going to show that a very substantial case must be made out to induce the Court to accede to an application to remove the

[1] *Re Warren's Settlement*, 52 L. J., Ch., 928; Brett's Eq. Cas., 121; *Re Little, Harrison* v. *Harrison*, 40 Ch. D., 418; 58 L. J., Ch., 233; 60 L. T., 246.

[2] *Re Torrance's Settlement*, 81 L. T., 118; *Law Students' Journal*, 1886, p. 167.

[3] *Hodges* v. *Hodges*, 20 Ch. D., 749; 51 L. J., Ch., 549. See other cases on this subject in Brett's Eq. Cas., 121-126; Hood & Challis, 114.

[4] *Re Pollard's Settlement* (1896), 2 Ch., 552; 65 L. J., Ch., 796; 75 L. T., 116; see also *Re Giorgi*, *Giorgi* v. *Wood*, 45 S. J., 615; *Law Students' Journal*, August, 1901, p. 184.

anticipation clause.[1] Every case must, no doubt, stand on its own merits; the Court has a judicial discretion, and it must be for the Court to decide whether it will exercise such discretion.

Liability of separate estate.

We have shown that not only can a married woman own separate property, but that she can also dispose of it, ~~subject to the~~ anticipation clause. It is also necessary to consider the extent of the liability of her separate property for her debts and engagements contracted during marriage. The general rule has long been that her debts or contracts, incurred or entered into during coverture, would bind her separate estate if she expressly charged them thereon, or if, judging from their nature, she might fairly be taken to have intended to charge them thereon, *e.g.*, a bond or a promissory note, or the like.[2] But engagements or liabilities entered into, or incurred, by a married woman, with regard to which there was no intention expressed to bind her separate estate, and which were not of such a character as to give rise to any presumption of such intention, would not so bind it.[3] And, of course, ordinary general engagements would not bind it, for, as regards these, she was, and is, presumed to enter into them as agent for her husband, and if this is the case, then, like any other agent acting properly, there is no personal liability, so that here there certainly could not be any intention to charge her own separate property; but if such an intention could be found, then even such debts as these would bind it.[4] The importance of a knowledge of the various decisions bearing on the subject of the liability of separate estate is not now great,

Hulme v. *Tenant.*

Provision of Married Women's Property Act 1882.

[1] See *Re Blundell's Trusts* (1901), 2 Ch., 221; 70 L. J., Ch., 522; 84 L. T., 706.
[2] *Hulme* v. *Tenant*, 1 Wh. & Tu., 654.
[3] *Davies* v. *Stanford*, 61 L. T., 234.
[4] *Matthewman's* Case, L. R., 3 Eq., 787.

for by the Married Women's Property Act 1882,[1] it is provided that every contract entered into by a married woman is to be *primâ facie* considered as binding her separate estate. This provision, therefore, reverses the position as regards contracts and engagements entered into since the Act,[2] and we do not now have, as before, to seek for words or intention, to bind the woman's separate estate; but still, of course, this does not make her separate estate ordinarily liable for debts for necessaries, unless, indeed, expressly charged thereon, for, as to these, she usually contracts as agent for her husband.

What separate estate of a married woman liable for her debts.

It was formerly held that, although a debt or contract was of such a nature as to bind a married woman's separate estate, yet it would only bind separate estate to which she was entitled at that date, and not separate estate which she subsequently acquired.[3] By the Married Women's Property Act 1882,[4] it was, however, provided that a married woman might bind all separate property which she was then possessed of, or might subsequently acquire; but it was decided that this provision did not make a married woman capable of rendering herself liable in respect of her separate property, on any debt or contract, unless she had some free separate estate at the time of incurring the debt or entering into the contract. If at the time she had any free separate estate, then, not only that, but any subsequently acquired separate property was liable; but if at the time she had no free separate estate, then, though she might afterwards acquire some, that could

Married Women's Property Act 1882.

Palliser v. *Gurney*.

[1] 45 & 46 Vict., c. 75, sec. 1 (2).
[2] The provision is not retrospective (*Davies* v. *Stanford*, 61 L. T., 234).
[3] *Pike* v. *Fitzgibbon*, 17 Ch. D., 454; 50 L. J., Ch., 394.
[4] 45 & 46 Vict., c. 75, sec. 1 (4).

not be held liable.[1] It is now, however, provided by the Married Women's Property Act 1893,[2] that every contract entered into by a married woman after 5th December, 1893, otherwise than as an agent, shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and shall bind all separate property which she may thereafter be possessed of or entitled to, and shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of, or entitled to. Nothing, however, in this provision is to render available, to satisfy any liability or obligation arising out of any contract made during marriage, any separate property which at that time, or thereafter, she is restrained from anticipating.[3] On this last provision it has been held that if a married woman is restrained from anticipating a life income at the date when she makes a contract, or at any subsequent date during the marriage, income which accrues therefrom after she becomes discovert cannot be taken in execution to satisfy a liability on that contract.[4]

Married Women's Property Act 1893.

Brown v. *Dimbleby*.

The whole liability of a married woman is not a personal one, but is a liability as regards her separate estate only,[5] and any judgment cannot be enforced against her personally. She is not liable to be

No personal liability on married woman's part.

[1] *Pallisser* v. *Gurney*, 19 Q. B. D., 519; 56 L. J., Q. B., 546; 35 W. R., 760; *Leak* v. *Driffield*, 24 Q. B. D., 98; 59 L. J., Q. B., 89; 61 L. T., 771; *Bonnar* v. *Lyon*, 38 W. R., 541.

[2] 56 & 57 Vict., c. 63, sec. 1.

[3] The Act, however, provides that where an action is brought by a married woman, the Court may order payment of costs out of property which she is restrained from anticipating (sec. 2). See *ante*, p. 426.

[4] *Barnett* v. *Howard* (1900), 2 Q. B., 784; 69 L. J., Q. B., 955; 83 L. T., 301; *Brown* v. *Dimbleby* (1904), 1 K. B., 28; 73 L. J., K. B., 35; 89 L. T., 424.

[5] *Scott* v. *Morley*, 20 Q. B. D., 120; 57 L. J., Q. B., 43; 57 L. T., 919.

made a bankrupt merely because she is possessed of separate estate,[1] but the Married Women's Property Act 1882[2] now provides that every married woman carrying on a trade separately and apart from her husband, shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*. But here again there is no personal liability, but only a liability in respect of separate property, so that it has been held that as a power of appointment is not, strictly speaking, property, such a power of appointment vested in a married woman does not pass to the trustee in her bankruptcy, and she cannot be compelled to exercise it for the benefit of her creditors.[3]

Summary of exceptions to the general effect of the anticipation clause.

Taking it as a general rule that the anticipation clause is effectual to prevent any disposition by a married woman, and to protect such property from seizure by her creditors, it may be useful to here summarize the exceptions to this, all of which have been, however, already mentioned :—

1. The anticipation clause does not protect her in respect of ante-nuptial liabilities, if she has thus before marriage settled her separate property.[4]

2. Property may, notwithstanding the anticipation clause, be impounded to indemnify a trustee where she has instigated, or requested, or in writing consented to, a breach of trust.[5]

3. Costs of the successful defendant, in an action brought by a married woman, may be ordered to be paid out of her separate estate, notwithstanding the anticipation clause.[6]

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[1] *Ex parte Jones, Re Grissell*, 12 Ch. D., 484; 48 L. J., Bk., 109.
[2] 45 & 46 Vict., c. 75, sec. 1 (5).
[3] *Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D., 521; 55 L. J., Q. B. D., 578.
[4] 45 & 46 Vict., c. 75, secs. 13, 19, *ante*, p. 426.
[5] 56 & 57 Vict., c. 53, sec. 45, *ante*, pp. 427, 428.
[6] 56 & 57 Vict., c. 63, sec. 2, *ante*, p. 426.

4. On application by a married woman, if for her benefit, the Court has power to enable her to dispose of her property, notwithstanding the anticipation clause.[1]

Receipt by husband of income of wife's separate property.

If a married woman, possessed of separate property, does not exercise her right of separate receipt, but permits her husband to receive the income thereof, she cannot ordinarily recover any arrears thereof from him, for allowing him to receive it usually amounts to a gift of it to him, either for the benefit of the family or otherwise.[2] If, however, income belonging to the wife has been received by the husband without her authority or tacit acquiescence, she will be entitled to reimbursement from him, or from his estate if he is dead.[3] And the principle of the receipt of income by a husband with his wife's consent, constituting a gift to him, has no application as regards capital money belonging to the wife and received by the husband, for the onus of proving a gift of capital to the husband who has received it, lies on him, or those who claim through him.[4] In one case, the facts were, that a mortgage belonging to the wife was transferred to the husband, who sold the property as mortgagee, and received the purchase-money, his wife concurring in the conveyance, and no proceedings were taken by the wife against her husband during the remaining period of coverture, about sixteen years. The wife had no separate advice, and her concurrence in the conveyance was obtained by the husband. It was held that these facts were not sufficient to establish a

Receipt by husband of capital.

Re Flamank, Wood v. *Cock.*

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[1] 44 & 45 Vict., c. 41, sec. 39, *ante*, p. 430.

[2] *Powell* v. *Hemkey*, 2 P. Wms., 82; *Caton* v. *Rideout*, 1 Mac. & G., 599.

[3] *Parker* v. *Brook*, 9 Ves., 583.

[4] *Re Flamank, Wood* v. *Cock*, 40 Ch. D., 461; 58 L. J., Ch., 518; 60 L. T., 376; *Re Blake, Blake* v. *Power*, 60 L. T., 663.

gift of the money to the husband.[1] In any such case the husband must be considered as holding the money received by him as a trustee for his wife, and the Statute of Limitations cannot be pleaded, it being a case of a trustee who has possessed himself of his *cestui que trust's* money which is excepted from the general provision of the Trustee Act 1888.[2]

Liability of husband in possession of wife's money.

In such a case as last dealt with, it will, however, be observed that it is only the capital the husband has to pay, and not interest on it, at any rate until his wife demands payment, or the husband dies. This must always be the position whenever the husband who is living with his wife has money of hers in his hands. In a recent case,[3] money belonging to a married woman was by a settlement authorised to be invested on personal security, the interest to be paid to the wife for her life for her separate use, and at her death the interest to be paid to the husband for his life. The money was lent to the husband on his bond, and after this the husband and wife lived together in amity for twenty-four years, when the wife died. The husband survived her for twenty years, and did not repay the money. During the whole of the wife's life the husband never paid her any interest on the bond, and naturally, on her death, he paid no interest, as he was the person expressly entitled to it. The husband dying, the question arose whether his estate was liable to repay the amount lent, to the representatives of the wife, and it was argued that the debt was statute barred. It was held that, during the life of the wife, the interest

Re Dixon, Heynes v. *Dixon.*

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[1] *Re Flamank, Wood* v. *Cock*, 40 Ch. D., 461 ; 58 L. J., Ch., 518 ; 60 L. T., 376.

[2] *Wassell* v. *Leggatt* (1896), 1 Ch., 554; 65 L. J., Ch., 240; 74 L. T., 99. As to Trustees and the Statutes of Limitations, see *ante*, pp. 103, 104.

[3] *Re Dixon, Heynes* v. *Dixon* (1900), 2 Ch., 561 ; 69 L. J., Ch., 609 ; 48 W. R., 665 ; 83 L. T., 129.

must be presumed to have been given to the husband from time to time, so that when she died the debt was still alive, and, this being so, as the husband was, after her death, himself entitled to the interest, there could be no further question of the debt being statute barred. Further, it was held that, notwithstanding the lapse of time, there was no presumption of payment of the bond, or of a gift of the capital by the wife to the husband, and that the debt was, at the husband's death, recoverable from his estate, together with interest from his death.

Purchase in name of husband.

When property is bought in the name of the husband with the wife's money, Equity draws the presumption that the husband was intended to hold as a trustee for his wife, and if the husband alleges the property was a gift to him, the onus of establishing such gift must be discharged by him; and it makes no difference whether the money was capital or income of the wife's separate estate.[1]

Devolution of separate estate on death of married woman.

On the death of a woman entitled absolutely to property for her separate use, and not having disposed thereof by deed or will, it has long been settled that if it is realty it goes to her heir, subject to the husband's curtesy,[2] and if it is personalty in possession, the husband takes it *jure mariti*, and if in action, he also takes it, but must obtain letters of administration to complete his title.[3] The question has, however, been raised whether in the case of property made the separate estate of a married woman by the provisions of the Married Women's Property Act 1882, a husband can now have any such right

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[1] *Mercier* v. *Mercier* (1903) 2 Ch., 38; 72 L. J., Ch., 511; 88 L. T., 516.

[2] *Cooper* v. *Macdonald*, 7 Ch. D., 288; 47 L. J., Ch., 373; *Hope* v. *Hope* (1892), 2 Ch., 336; 61 L. J., Ch., 441; 66 L. T., 522.

[3] See 1 Wh. & Tu., 703; Indermaur & Thwaites' Conveyancing, 229, 209-214.

in his wife's undisposed of separate property, as she is to be deemed as a *feme sole* and a separate individual. In the first edition of this work it was submitted that it was not the intention of the Legislature to take away any rights of the husband on the death of his wife intestate, but merely to protect her estate, and give her the powers of disposition of a *feme sole* during her lifetime, and that the position had not been altered by the provision in question. This has since been decided to be the correct view[1]; but in whatever way the husband takes, whether *jure mariti* or on taking out letters of administration, he takes subject to his wife's debts.[2]

Re Lambert.

A married woman will be protected by the Court in the enjoyment of her separate property, and the husband will, if necessary, be restrained by injunction from interfering with it.[3] And, under the Married Women's Property Act 1882,[4] any questions of ownership arising between husband and wife, may be decided by summary application to a Judge of the High Court of Justice, or to the Judge of the district County Court, irrespective of the value of the property.

Protection to married woman in respect of her separate property.

Pin-money is closely allied to separate estate, and may be defined, or described, as an allowance settled upon the wife before marriage for the wife's expenditure upon her person, to meet her personal expenses, and clothe herself according to her proper rank and station.[5] The provision for pin-money is usually

Pin-money.

[1] *Re Lambert, Stanton* v. *Lambert*, 39 Ch. D., 626; 57 L. J., Ch., 927; 59 L. T., 429.
[2] *Surman* v. *Wharton* (1891), 1 Q. B., 491; 60 L. J., Q. B., 223; 64 L. T., 866.
[3] *Green* v. *Green*, 5 Hare, 400; *Symonds* v. *Hallett*, 24 Ch. D., 346; 53 L. J., Ch., 60.
[4] 45 & 46 Vict., c. 75, sec. 17.
[5] See *Howard* v. *Digby*, 8 Bligh. N. R., 259.

contained in the settlement made upon marriage, but gifts or gratuitous payments may be made from time to time by the husband for the like purposes.[1]

What arrears of pin-money recoverable.

The object of the allowance of pin-money being to enable the wife to meet her personal expenses, if she lets it get into arrear she cannot as a general rule, on her husband's death, claim for more than one year's arrears due prior to his death. Under special circumstances, however, more may be recovered; thus where a wife, from time to time, demanded the arrears of her pin-money from her husband, and he always promised she should have it, it was held that she was not limited in her claim to one year's arrears, but could recover all arrears due at the husband's death.[2] If a wife dies, her personal representatives cannot recover any arrears of her pin-money.[3]

Ridout v. *Lewis*.

Paraphernalia.

Paraphernalia of a wife is a peculiar kind of property possessed by a married woman, somewhat allied to separate estate, but yet held in a very different way.[4] This paraphernalia consists of such apparel and ornaments of the wife, given to her *by her husband*—not absolutely but for her use as a wife only—as are suitable to her rank and condition in life, *e.g.*, rings, watches, and other jewellery given to the wife to be worn merely as ornaments.[5] The property possessed by the wife in her paraphernalia, is of an anomalous character, for she has no power to dispose of it during her husband's life, whilst the husband can dispose of it (except her necessary wearing apparel) either by sale or gift *inter vivos*,

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[1] 1 Wh. & Tu., 726.
[2] *Ridout* v. *Lewis*, 1 Atk., 269.
[3] *Howard* v. *Digby*, 3 Bligh, N. R., 245.
[4] See Wh. & Tu., 727-729.
[5] *Graham* v. *Londonderry*, 3 Atk., 394.

though not by will, so that on his death she is absolutely entitled to it, but subject to payment of his debts. The wife's paraphernalia is, however, only liable, in default of all the proper assets of the deceased, and if it is taken by creditors for payment of their debts, when there is any other property available for payment, she is entitled to have the assets marshalled in her favour, so that the amount of her paraphernalia shall be made good to her.[1] If a husband pledges his wife's paraphernalia, and dies solvent, she is entitled to have it redeemed for her benefit, and this even to the prejudice of any legatees.[2]

When jewels, &c., constitute separate estate

Tasker v. *Tasker.*

Jewels, ornaments, and the like, not given to a woman by her husband, but by a third party, are not paraphernalia, but are considered as being given to her for her separate use.[3] Gifts from a husband to his wife may be paraphernalia, or may be separate estate; which it is, depends on the nature and mode of the gift; and gifts of jewellery made by a husband to his wife on occasions such as Christmas Day, and on her birthdays, and to settle differences which had arisen between them, have been held not to be paraphernalia, but separate estate, unless it can be shown that the husband intended to impress the character of paraphernalia upon them, which he can do, for the Married Women's Property Act 1882 does not affect a gift of paraphernalia.[4]

Equity to a settlement.

A doctrine of the Court, which has been of great service to married women, is that known as her equity to a settlement, which may be defined as a right given to a married woman by the Court,

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[1] *Tipping* v. *Tipping*, 1 P. Wms., 730; see *ante*, pp. 154, 160.
[2] *Graham* v. *Londonderry*, 3 Atk., 393.
[3] *Graham* v. *Londonderry*, *supra*; Story, 947.
[4] *Tasker* v. *Tasker* (1895), P., 1; 64 L. J., P., 36; 76 L. T., 779.

under which she may insist on a settlement being made upon her out of property coming to her during coverture, and which might otherwise be seized by her husband. The student will have observed that a wife's personal property, practically, formerly became her husband's,[1] and the reason, no doubt, was the obligation he was under to provide for his wife. There being, however, no direct mode of enforcing this obligation, the Court of Chancery gave the married woman some assistance by an application of the maxim, "He who seeks Equity must do Equity," for when the husband had, as was often the case, to come into Chancery to get his wife's property, the Court would, if it appeared right to do so, refuse to assist him unless he made an adequate settlement on his wife.[2]

Origin of the doctrine.

Extension of the doctrine.

This, then, was the origin of the doctrine; but as it thus stood it was plainly insufficient, for, in many cases, the husband could obtain his wife's property without having to seek the assistance of the Court of Chancery. The doctrine, however, received a great extension in the leading case of *Lady Elibank* v. *Montolieu*.[3] There it was held that the wife might come and actively assert her right as a plaintiff; so that when she found her husband was likely to acquire her property without the assistance of the Court, she could come to the Court, and assert and maintain her right to a settlement thereout.[4] It was always necessary, however, that she should come to the Court before her husband got possession. The claims of the husband, therefore, to his wife's property were subject to this equity of the wife to have a settlement decreed for her if it appeared to

Lady Elibank v. *Montolieu*.

[1] See *ante*, pp. 416, 417.
[2] *Bosvil* v. *Brander*, 1 P. Wms., 459; see also *ante*, pp. 19, 20.
[3] 1 Wh. & Tu., 621.
[4] See also *Sturgis* v. *Champneys*, 5 My. & Cr., 105.

be proper. Thus, in one case a testator bequeathed to his married daughter certain moneys, and this bequest not being made for her separate use, and the provisions of the Married Women's Property Act 1882 not applying (by reason of the parties having been married, and the property having accrued, before that Act came into operation), the husband became entitled thereto, subject to reducing the same into possession. The husband was, however, indebted to the testator, in an amount exceeding his wife's interest, and the question was whether the executors could set this debt off, or whether the wife could claim on the principle of being entitled to equity to a settlement. The Court held that, though the executors had a right to set-off the debt due from the husband against the moneys given to the wife, yet, as the claim of the husband, if there had been no debt, would have been subject to the wife's equity to a settlement, which would, therefore, have been paramount to the husband's claim, the wife's equity must also prevail over the executor's right of set-off.[1]

Re Briant, Poulter v. *Shackel.*

Any lengthened consideration of this subject would be out of place here, because of its practical unimportance, in consequence of the provisions of the Married Women's Property Act 1882[2]; for, as now, generally speaking, all property is to the separate use of a married woman, it is hers, and in no way is it her husband's, and he has, legally speaking, nothing to do with it. The doctrine of equity to a settlement will soon be merely a thing of the past; but it is not quite so at present, for cases can yet arise in which it may be necessary to assert this right. It has been already mentioned, that if a woman, married before 1st January, 1883, is entitled

Equity to settlement not an important doctrine now, and will in course of time become obsolete.

[1] *Re Briant, Poulter* v. *Shackel*, 39 Ch. D., 471; 57 L. J., Ch., 953; 59 L. T., 219.

[2] See *ante*, p. 417.

to a reversionary interest under some settlement or will, which came into operation before that date, it is property which accrued to her when she first acquired such reversionary interest, and although it falls into possession on or after 1st January, 1883, it is not property which has accrued to her since the Act.[1] Here, then, if personal property, the husband will take it, and the only course to prevent this is for the wife to assert this right. In fact, in *Reid* v. *Reid*, cited below, this is just what happened; the Court decided that the property was not to the wife's separate use, and that, therefore, the husband was entitled to it, but then subsequently it enforced her claim to a settlement.[2] The following remarks on the subject of equity to a settlement have, therefore, now but a very limited practical application.

Reid v. *Reid.*

Out of what property the right attaches.

The right of a married woman to her equity to a settlement was, for a long time, supposed to be confined to purely personal property of the wife of an equitable nature; but, in modern times, it has acquired a wider range, and is generally applied also to all classes of equitable interests in real estate as well, and also to all cases of real estate of the wife, whether legal or equitable, where the husband is obliged to come to a Court of Equity to enforce his rights against the property.[3] As regards leasehold property, if of an equitable nature, it appears that the wife is entitled to enforce her equity to a settlement thereout,[4] but that she is not so entitled if it is a legal term of years.[5]

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[1] See *ante*, pp. 417, 418; *Reid* v. *Reid*, 31 Ch. D., 402; 55 L. J., Ch., 294; 54 L. T., 100.

[2] *Reid* v. *Reid*, 33 Ch. D., 220; 55 L. J., Ch., 756; 55 L. T., 153.

[3] Story, 959.

[4] *Hanson* v. *Keating*, 4 Hare, 1.

[5] *Hill* v. *Edmonds*, 5 De G. & S., 603; *Heron* v. *Heron*, W. N., 1887, p. 158.

Against whom the right is enforced.

Not only can the wife enforce her equity to a settlement against her husband, but also against his trustee in bankruptcy, or his voluntary assignees. With regard, however, to the extent of the right, even in enforcing it against the husband, the Court will not ordinarily take from the husband the income of the property so long as he is willing to live with, and maintain, his wife, and there is no reason for their living apart. The most the Court will do under such circumstances, is to secure the fund, allowing the husband to receive the income,[1] and, therefore, when this is so, either as against the husband, or his assignee, the settlement ordered will ordinarily be one which provides for the wife only from her husband's death. But, if the husband is bankrupt, and the wife is enforcing her right against his trustee in bankruptcy, then, as he is taken to be incapable of maintaining his wife, the Court ordinarily decrees a settlement providing for her immediate maintenance.[2] It, therefore, follows that if a wife is entitled to a life interest only in property, although she can enforce her equity to a settlement against her husband's trustee in bankruptcy, she cannot ordinarily do so against him, or against a person to whom he has assigned it.

The amount of the property to be settled on wife.

Although a wife may be entitled to enforce her equity to a settlement, it does not follow that the whole of the property will be settled on her. This is a matter left to the discretion of the Court. The general rule is that, in the absence of special circumstances, half the property only will be settled; but the Court may take into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been

[1] Story, 963.
[2] *Ibid.*, 966.

made, or the husband's ill conduct, or insolvency, and may, according to circumstances, settle a less or a greater portion, or even the whole.[1]

Nature of the right of equity to a settlement.

Equity to a settlement is not property in a wife, but is simply a right that she has to come to the Court and ask for a settlement. It is a right personal to the wife, and may be waived or abandoned, or may be lost by her act[2]; but if she proceeds to enforce it, and the Court decrees a settlement, that settlement provides also for the children of the marriage.[3] But, although the children have no independent rights of their own, yet if the Court decrees a settlement on the wife's application, and then the wife dies before a settlement is actually made, the Court will carry out the settlement in their favour, notwithstanding her death.[4]

Murray v. *Lord Elibank.*

Nature of the settlement.

In ordinary cases, when the Court decrees a settlement, the nature of that settlement is a separate provision for the wife for her life, without power of anticipation, with a power of appointment by her amongst her children, and, in default of appointment to her children by that or any subsequent marriage, equally between them, sons on attaining twenty-one, and daughters on attaining that age or marrying, and, in default of children, to the husband absolutely.[5]

How the right lost or waived.

A wife will ordinarily lose any right of equity to a settlement, if she is living apart from her

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[1] 1 Wh. & Tu., 639; *Reid* v. *Reid*, 33 Ch. D., 220 55 L. J., Ch., 756; 55 L. J., 153; *Re Briant, Poulter* v. *Shackel*, 39 Ch. D., 471; 57 L. T., Ch., 953; 59 L. T., 219.

[2] *Hodgens* v. *Hodgens*, 11 Bligh, N. S., 104.

[3] *Johnson* v. *Johnson*, 1 J. & W., 472.

[4] *Murray* v. *Lord Elibank*, 1 Wh. & Tu., 625.

[5] 1 Wh. & Tu., 641.

husband in adultery,[1] unless she is a ward of Court married without its consent.[2] A wife may waive her equity to a settlement by appearing in Court and being separately examined by the Judge, or by a commission issued for the purpose of receiving her waiver.[3] And, under the provisions of Malins' Act,[4] she may release and extinguish her equity to a settlement out of personal property in possession, acquired by her under any instrument (not being a settlement on her marriage) made after 31st December, 1857.

The wife's right by survivorship.

A wife's equitable right by survivorship must be carefully distinguished from her right of equity to a settlement. It consists of her right to her outstanding property, not reduced into possession, if she survives her husband, and it needs no active enforcement by her. Thus, if the husband does not reduce his wife's *choses in action* into possession, or if her reversionary interests in pure personalty do not fall into possession during coverture, then, at her husband's death, she has an absolute right by survivorship, and all assignments that may have been made by the husband are of no avail against such right, and this even although she may have joined in the assignment,[5] subject, however, to the provisions of Malins' Act, presently mentioned. Any assignment by the husband was not, and could not, from the nature of the thing, amount to a reduction into possession, and her consent during the coverture to any assignment was not binding upon her. Nay, in such a case the wife's consent in Court to the transfer of a reversionary interest to her husband

[1] *Carr* v. *Eastabrooke*, 4 Ves., 146.
[2] *Ball* v. *Coutts*, 1 V. & B., 302.
[3] 1 Wh. & Tu., 644.
[4] 20 & 21 Vict., c. 57. The strictly proper title or description of this Act is The Married Women's Reversionary Interests Act, 1857.
[5] *Purdew* v. *Jackson*, 1 Russ., 1.

was not allowed. That consent was not acted upon by the Court, except where she had to part with her equity to a settlement, or with her own present and immediate separate property, and was never acted on for the purpose of enabling her to part with her reversionary property or with her right of survivorship.[1] This right of survivorship in the wife is superior to any equity to a settlement, and, therefore, as by it she is fully protected as regards her reversionary property, she cannot claim any equity to a settlement thereout, though, of course, she may do so when the reversionary interest falls into possession.[2] However, now by Malins' Act,[3] it is provided that every married woman may, with the concurrence of her husband, by deed acknowledged in the manner prescribed by the Fines and Recoveries Act 1833,[4] dispose of every reversionary interest, whether vested or contingent, in any personal estate to which she is entitled under any instrument (not being her marriage settlement) made after 31st December, 1857. There may still, however, be cases in which a married woman is entitled to some such reversionary interest under an instrument executed prior to the above date, and, in that event, her right by survivorship cannot be taken away from her. Thus, in one case, by a will made before Malins' Act came into operation, a testatrix bequeathed a reversionary interest in personal property to a married woman, and by a codicil made since the Act she gave various legacies, and then died. The married woman had professed to dispose of her reversionary interest by deed, together with her husband, and duly acknowledged by her, but the Court held that, as she took her interest

Provision of Malins' Act.

Re Elcom, Laybourn v. *Grove-Wright.*

[1] Story, 962.
[2] *Osborn* v. *Morgan*, 9 Hare, 432.
[3] 20 & 21 Vict., c. 57.
[4] 3 & 4 Wm. IV., c. 74.

entirely under the will, and not under the codicil, and the will was executed before Malins' Act came into operation, although the testatrix died since the Act, she had no power of disposition, and the deed by which she had attempted to assign it was void.[1]

Effect of Married Women's Property Act 1882.

Of course, however, now if a woman has married since the 1st January 1883, any reversionary interest she may be entitled to is her separate estate, under the Married Women's Property Act 1882, and she can, therefore, do what she likes with it; she remains in fact a *feme sole*, in all respects, as regards her property. And even though married before the Act, if her title to the property has accrued to her since the Act, it is to her separate use in the same manner. In time, therefore, Malins' Act must necessarily become an obsolete provision, and even now it is not of much importance.

Separation deeds.

It was at one time thought that the Court would never give effect to and enforce a deed of separation entered into between husband and wife, but it is now well established that it will do so, provided it is not a contract for future, but for present, separation.[2] It was formerly also considered that the intervention of trustees was necessary in a deed of separation; but this is not so now, and a wife may herself contract with her husband as to the separation,[3] and such contract may even be by word of mouth.[4] Manifestly, however, it is advisable that any separation arrangement should be carried out by a proper deed, and, in most cases, that there should be

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[1] *Re Elcom, Laybourn* v. *Groves-Wright* (1894), 1 Ch., 303; 63 L. J., Ch., 392; 70 L. T., 54.
[2] Story, 969; *Wilson* v. *Wilson*, 1 Wh. & Tu., 577.
[3] *Re Besant*, 12 Ch. D., 605; 48 L. J., Ch., 497.
[4] *McGregor* v. *McGregor*, 21 Q. B. D., 424; 57 L. J., Q. B., 591.

trustees who may protect the wife's interest, and also covenant to indemnify the husband against her debts. A deed of separation does not alter the legal condition of the wife, but her rights and general position remain the same, subject to any provisions of the deed. The Court has power to enforce specific performance of such a deed, or of an agreement for the compromise of a suit in the Divorce Court, without infringing the provisions of the Judicature Act,[1] which prohibit interference with proceedings pending in another branch of the Court.[2]

Presumption that woman past child-bearing.

Before concluding this chapter, it may not perhaps be out of place to draw attention to the fact that the Court will sometimes, as regards a woman, draw a presumption that no child will be born to her. To do so, often enables a fund to be immediately divided. Thus, suppose property is given to A (a woman) for life, and then to A's child, or children, absolutely, but if A has no child, then to B absolutely. If A has no child, and the Court is content to presume that no child will ever be born, there may, by arrangement between A and B, be an immediate division of the fund. The Court will never draw a presumption of this kind in the case of a man, however old he may be, but it has often done so in the case of a woman.[3] Thus, in a recent case,[4] a testator bequeathed certain property to trustees in trust for A (a woman) for life, and then for such of her children, equally, as should attain 21. A was

Re White, White v. *Edmond.*

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[1] See *post*, p. 454.

[2] *Hart* v. *Hart*, 18 Ch. D., 670; 50 L. J., Ch., 697; 45 L. T., 13. See, generally, as to Articles of Separation between husband and wife, *Wilson* v. *Wilson*, and notes 1 Wh. & Tu., 577.

[3] See *Haynes* v. *Haynes*, 35 L. J., Ch., 303; *Re Widdow's Trusts*, 40 L. J., Ch., 380; L. R., 11 Eq., 408; *Re Millner*, L. R., 14 Eq., 245; 42 L. J., Ch., 44; *Croxton* v. *May*, 9 Ch. D., 388; *Re Hocking* (1898), 2 Ch., 567; 67 L. J., Ch., 662.

[4] *Re White, White* v. *Edmond* (1901), 1 Ch., 570; 70 L. J., Ch., 300; 84 L. T., 199.

born in 1844, and married in 1866, and had only one child, who was born within a year of her marriage, and she became a widow in 1890. At the time of the application to the Court she was a little over 56 years of age, and she and the one child sued for a declaration that they together were absolutely entitled to the property, so that they might deal with it, instead of leaving it tied up on the chance that A might marry again and have more children. The Court acceded to the application. In these cases the Court considers whether the woman is a spinster or married, how long married, whether husband dead or alive, whether children or not, and when the last child was born.[1]

[1] *Re Thornhill* (1904), W. N., 112.

CHAPTER VII.

INJUNCTIONS.

Definition of an injunction.

An injunction may be defined as a judicial process, whereby a party is required to abstain from doing a particular act, or to do a particular act, in which latter case it is styled a mandatory injunction. The object of the process is generally preventive and protective, rather than restorative, although not necessarily confined to the former ; it seeks, however, to prevent a meditated wrong more often than to redress an injury already done.[1]

Injunctions of two kinds.

Injunctions were formerly divisible into two general classes, viz., common injunctions and special injunctions, and although injunctions of the former class are not now ordinarily granted, it is necessary to give them some consideration.

Common injunctions.

By a common injunction is meant an injunction which was granted by the Court of Chancery to restrain proceedings in another Court. This was a power at first arrogated by the Court of Chancery to itself, and much disputed, but finally established. The principle upon which the Court of Chancery claimed this power was, that it was not right to allow a judgment of a Court of Common Law to be made an instrument of oppression and wrong. The Court of Chancery did not pretend to overrule the judgment of a Court of Law, but, acting *in personam*, would in some cases restrain a person from

[1] Story, 572.

proceeding on a judgment at Common Law, or from further proceeding in an action there. The Court of Chancery would so act if the judgment was obtained by fraud, or if the defendant in the Common Law action had what would have been recognised in Chancery as a defence, but was not so recognised at Law. The matter was the subject of a great dispute between Lord Ellesmere and Lord Coke in the time of James I., and was referred to the King in person, and he decided in favour of the power of the Court of Chancery.[1]

When Equity would grant an injunction of this kind.

Equity, therefore, would grant an injunction to restrain proceedings in a Common Law Court, when it was against conscience to allow the party restrained to proceed there. Cases of this kind usually occurred when the defendant in the Common Law action had a defence which Equity would recognise, but which Law would not. The Common Law Procedure Act 1854[2] endeavoured to remove such a strange state of things as one Court practically restraining proceedings in another, by enacting that equitable pleas and replications might be made use of at Common Law. But the narrow construction put upon this provision by the Courts of Common Law, which held that no equitable plea was good unless it disclosed such facts as would entitle the party to an absolute and unconditional injunction in Equity, rendered applications to Chancery still necessary in many cases.[3] Hence, at the time of the passing of the Judicature Act 1873,[4] common injunctions were often granted.

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[1] See Hallam's Constitutional History, Vol. I., p. 346; Campbell's Lives of the Chancellors, Vol. II., p. 362; *Earl of Oxford's* Case, 1 Wh. & Tu., 730.

[2] 17 & 18 Vict., c. 125, sec. 83.

[3] 1 Wh. & Tu., 740.

[4] 36 & 37 Vict., c. 66.

Provisions of the Judicature Act 1873.

Such a state of things is, of course, easily understood when we recognise the fact that Law and Equity were two distinct systems, but it would be absurd for that condition of affairs to be existing at the present time, now that Law and Equity are fused, and constitute one complete system under the Judicature Acts 1873 and 1875. It has, therefore, been provided that no Division of the High Court of Justice can restrain proceedings in another Division, but that every matter of Equity, in respect of which an injunction might formerly have been obtained, may be relied on by way of defence in any action [1]; and that, generally, in all matters in which there is any conflict or variance between the rules of Equity and Law with reference to the same subject matter, the rules of Equity shall prevail.[2]

Effect of these provisions.

The effect of these provisions is, that as the Courts of Law and Equity are no longer distinct, and as the rules of Equity in all cases of conflict prevail over those of Law in every Division of the High Court, an injunction to restrain proceedings on a judgment, or to restrain an action pending, in one Division of the High Court, can no longer be granted by another Division.[3] However, the High Court may grant an injunction to restrain a person from instituting proceedings in any Division contrary to his express agreement, *e.g.*, to restrain a wife from instituting proceedings for the purpose of compelling her husband to cohabit with her, contrary to her express covenant contained in a deed of separation.[4] And the Court has interfered by injunction to restrain a person, claiming to be a creditor of a company, from presenting a petition to wind up the company,

Injunction may be granted to restrain persons from instituting proceedings.

[1] 36 & 37 Vict., c. 66, sec. 24 (5).
[2] *Ibid.*, sec. 25.
[3] *Garbutt* v. *Fawcus*, 1 Ch. D., 155; 45 L. J., Ch., 133.
[4] *Re Besant*, 12 Ch. D., 605; 48 L. J., Ch., 497.

where the debt was *bonâ fide* disputed, and the company was shown to be solvent.[1]

Restraining proceedings against an executor, or administrator, or a company.

An instance in which the Court of Chancery used formerly to grant an injunction to restrain proceedings in another Court, was, where a decree had been made for the administration of the estate of some deceased person, and actions were pending against the executor or administrator to recover any debt or damages; or in case of the winding-up of companies, where an order had been made for winding-up, and actions were pending against the company.

Proper course now.

After the passing of the Judicature Acts, the proper course in administration proceedings was held to be, to apply in the particular action brought by the creditor to stay further proceedings therein, and for the transfer of the action to the Chancery Division[2]; but the proper course in winding-up proceedings was the subject of much conflict of judicial opinion, as to whether the application to stay should be to the Chancery Division, or to the Court in which the action was pending. All such doubts have been now settled by a direct provision to the effect that, when an order has been made for the administration of the estate of a deceased person, or for the winding-up of any company, the Judge in whose Court such administration or winding-up shall be pending, shall have power to order the transfer to himself of any cause or matter pending in any other Court or Division, brought or continued by or against the executor or administrator, or the company, as the case may be.[3]

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[1] *Cercle Restaurant Castiglione Company* v. *Lavery*, 18 Ch. D., 555; 50 L. J., Ch., 837.

[2] *Re Stubbs' Estate, Hanson* v. *Stubbs*, 8 Ch. D., 154; 47 L. J., Ch., 671.

[3] Order XLIX., rule 5.

Restraining proceedings against a bankrupt.

It may be noticed that, where bankruptcy proceedings are pending in the High Court, an order may be made in bankruptcy, restraining any action or other proceedings against the person or property of the debtor.[1] But the County Courts exercising jurisdiction in bankruptcy have no power to restrain proceedings in the High Court against a trustee in bankruptcy, and an application to stay must be made to the High Court in any such action.[2]

Restraining proceedings in a foreign Court.

Whenever parties are resident here, the Court has power to restrain such persons from proceeding in a Court out of the jurisdiction, whether such a Court is actually the Court of a foreign country, or of Scotland, or Ireland, or of a Colony.[3] The Court does not interfere upon any pretension to control or over-rule the decisions of such Courts, or to examine judicial or administrative acts abroad, but *in personam* by reason of the party against whom the order is made being within the power of the Court, and that the questions to be determined are such as ought to be adjudicated upon in this country.[4]

Or in inferior Courts.

The Court still appears to have jurisdiction to restrain proceedings in an inferior Court, *e.g.*, the Lord Mayor's Court or a County Court.[5]

Restraining applications to Parliament.

Although the Court, manifestly, can have no jurisdiction to restrain an application to Parliament for a public Act, it has been held that there is vested in the Court a power to restrain an application for a private Act, provided a proper case can be made out for the Court's interference, but what would be a proper case for the purpose is very difficult

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[1] 46 & 47 Vict., c. 52, sec. 10 (2).
[2] *Re Barnett, Ex parte Reynolds*, 15 Q. B. D., 169; 54 L. J., Q. B., 354; 53 L. T., 448.
[3] Story, 581, 582.
[4] 1 Wh. & Tu., 749.
[5] *Ibid.*, 742.

to conceive.[1] Practically it may be taken that though the Court has such a power, it invariably refuses—except where the matter complained of is connected solely with private property[2]—to exercise it, for the parties objecting to the proposed Act can be heard before the Committees of the Houses of Parliament in opposition to it. But the Court will interfere by injunction to restrain the application of trust funds, or the assets of a company, towards the costs of an application for an Act of Parliament, where they cannot lawfully or properly be so applied.[3]

Special injunctions.

By a special injunction is meant one which is granted to restrain, or compel, the doing of some particular thing, *e.g.*, the committal of waste, or of a nuisance, the infringement of patents, copyrights, or trade marks, the publication of private letters, and other acts which might tend to injure the plaintiff. The proper remedy for breach of the by-laws of a local authority is that specified in the by-laws,[4] but such by-laws can be enforced by injunction on an information in the name of the Attorney General at the relation of the authority.[5]

Injunctions to prevent waste.

The whole idea of the jurisdiction of the Court in cases of this nature is to prevent a wrong, and the exercise of this jurisdiction in cases of waste may be referred to the broadest principles of social justice. The interference of the Court was originally confined

[1] *Heathcote* v. *North Staffordshire Railway Company*, 2 Mac. & G., 100.

[2] *Lancaster & Carlisle Railway Company* v. *North Western Railway Company*, 2 K. & J., 303; *Telford* v. *Metropolitan Board of Works*, L. R., 13 Eq., 594; 41 L. J., Ch., 589.

[3] *Simpson* v. *Denison*, 10 Hare, 51; *Attorney General* v. *Corporation of Norwich*, 16 Sim., 225.

[4] *Devonport Corporation* v. *Tozer* (1902), 2 Ch., 182; 71 L. J., Ch., 154; 86 L. T., 612.

[5] *Attorney General* v. *Ashbourne Recreation Company* (1903), 1 Ch., 101; 72 L. J., Ch., 67; 87 L. T., 561.

to cases founded on a privity of title, *e.g.*, a remainderman against a tenant for life, but, by insensible degrees, the jurisdiction was enlarged to reach cases of adverse claims and rights not founded on privity, *e.g.*, to cases of trespass attended with irreparable mischief.[1] But the Court would formerly only interfere by injunction in cases of trespass, to prevent irreparable mischief, or to suppress multiplicity of suits, and oppressive litigation, for if the trespass were but temporary, and adequate compensation could be obtained in an action at Law, the Court would not interfere by injunction, but, if otherwise, then it would. Thus, for instance, the Court would grant an injunction where a mere trespasser dug into and worked a mine to the injury of the owner, because it permanently affected the property.[2] And now, by the Judicature Act 1873,[3] it is provided that an injunction may be granted by an interlocutory order of the Court, in all cases in which it shall appear to be just or convenient that such order should be made, and such order may be made with or without conditions, and either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, and whether or not the person against whom such injunction is sought, is or is not in possession under any claim of title or otherwise, or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both, or either, of the parties are legal or equitable.

Cases of trespass.

Provisions of Judicature Act 1873, sec. 25 (8).

Effect of this provision.

It will be noticed that, under the enactment just referred to, the Court has power to grant an

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[1] *Earl of Talbot* v. *Scott*, 4 Kay & Johnson, 96.
[2] Story, 597, 598.
[3] 36 & 37 Vict., c. 66, sec. 25 (8).

injunction whenever it is just or convenient to do so, and, of course, under it, an injunction to restrain waste, or any other wrongful act, may now be granted by any Division of the Court. But it has been held that the effect of this provision is not to alter or extend the principles upon which the Court has always acted in granting injunctions; that, in fact, the Court must be guided by previous decisions as to when it is just and convenient, and that there is no arbitrary power vested in the Court to interfere in this way.[1] Thus, in one case, the plaintiffs alleged that their house had been called "Ashford Lodge" for sixty years, and that the defendants, whose adjoining house had been called "Ashford Villa" for forty years, had recently changed the name of their house to "Ashford Lodge," and that this caused considerable expense, and damage, and extreme and increasing personal inconvenience and annoyance, to the plaintiffs, and the plaintiffs sought an injunction to restrain the defendants calling their residence "Ashford Lodge." The Court of Appeal refused to accede to the application, although no doubt what was occurring was inconvenient, and perhaps unjust to the plaintiffs. The Court decided that there was no legal right to a particular name for a residence, and that, therefore, there was no violation of a right; and, that this being so, it was not for the Court to say that because the defendants were doing something which was not perhaps morally right, that it should therefore interfere, and that the Court could only do so when there was an invasion of a legal or equitable right.[2]

Day v. *Brownrigg.*

[1] *Day* v. *Brownrigg*, 10 Ch. D., 294; 48 L. J., Ch., 173; *Gaskin* v. *Balls*, 10 Ch. D., 324; 28 W. R., 552; *North London Railway Company* v. *Great Northern Railway Company*, 11 Q. B. D., 36; 52 L. J., Q. B., 380; 48 L. T., 695; and see Brett's Eq. Cas., Notes to these decisions.

[2] *Day* v. *Brownrigg*, *supra*; Brett's Eq. Cas., 372.

Equitable waste.

In most cases of waste and trespass, there has always been an action at law for damages, and the granting of an injunction was only an additional remedy afforded in Equity. In the one case, however, of a tenant for life holding without impeachment for waste, the Courts of Law held that the tenant for life was justified in doing anything that he chose, and the only remedy was in Equity. The Court of Chancery would grant an injunction to restrain such a tenant from pulling down the family mansion house,[1] or cutting ornamental timber, upon the principle that there was an implied trust in favour of the remainderman, and that it was unjust to allow the tenant for life to injure him to this extent.[2] This was, therefore, styled equitable waste. Now, under the provisions of the Judicature Act 1873,[3] a tenant for life without impeachment for waste can be made liable for such acts in damages, and restrained by injunction, in any Division of the Court.

Injunctions against nuisances.

With regard to injunctions to restrain nuisances, a distinction must be observed between such as affect the community at large, that is public nuisances, and those which only affect particular individuals, that is, private nuisances. The remedy for a public nuisance is by indictment at Common Law, or by an information in Chancery, in the name of the Attorney General, for an injunction. Any individual affected by a public nuisance can bring the matter before the Attorney General, and obtain his fiat to commence proceedings in his name, and such person is then called the relator, and has the conduct of the proceedings, and is liable for the costs. An injunction can be obtained in this way to prevent

Public nuisances.

Relator.

[1] *Vane* v. *Lord Barnard*, Prec. Ch., 454; 1 Salk, 161; 2 Vern., 738.
[2] *Garth* v. *Cotton*, 2 Wh. & Tu., 971.
[3] 36 & 37 Vict., c. 66, sec. 25 (3).

the stopping up of a public highway, or the carrying on of any noxious occupation,[1] or, indeed, the doing of any act which will affect a whole neighbourhood. But, in addition to this, it must be noticed that if the nuisance, though a public one, affects a private individual more than the community at large, he may maintain an action for an injunction in his own name, *e.g.*, where a person lives close to a place where a bell is continually rung, and which constitutes a nuisance to the neighbourhood, for he, by his proximity to the nuisance, is more injured than his neighbours.[2] The remedy in respect of a private nuisance is, of course, an action for an injunction by the individual affected, *e.g.*, to restrain noxious vapours, or smoke,[3] or the obstruction or pollution of a stream running by the plaintiff's land,[4] or any other wrongful or injurious act.

Soltau v. *De Held.*

Private nuisances.

As to what will constitute a nuisance, that is a question of fact in every particular case. A person may be carrying on a perfectly lawful trade, in a perfectly lawful manner, but yet what he does may constitute a nuisance.[5] Generally, the Court, in determining whether the user by a person of a building occupied by him constitutes an actionable nuisance to his neighbour, must have regard to the question whether he is using the building in a reasonable and usual manner, for the ordinary purposes for which it was intended.[6] If, however, it is impossible to use the premises for the particular purpose without constituting a nuisance, it is impossible to justify the use of them in such a

What will constitute a nuisance.

[1] *Attorney General* v. *Cole* (1901) 1 Ch., 205; 70 L. J., Ch., 148; 83 L. T., 725.

[2] *Soltau* v. *De Held*, 2 Sim. (N.S.), 133; 21 L. J., Ch., 153.

[3] *Broadbent* v. *Imperial Gas Company*, 7 De G. M. & G., 436.

[4] *Kensit* v. *Great Eastern Railway Company*, 27 Ch. D., 122; 54 L. J., Ch., 19; 51 L. T., 862.

[5] *Attorney General* v. *Cole* (1901), *supra*.

[6] *Sanders-Clarke* v. *Grosvenor Mansions Company* (1900), 2 Ch., 373; 69 L. J., Ch., 579; 82 L. T., 578.

manner, for a reasonable nuisance has no existence at law, and if a man so carries on his business as to create a nuisance, he is acting unreasonably, and ought to be restrained by injunction.[1]

Nuisance to personal comfort.

If an alleged nuisance causes personal discomfort, as distinguished from damage to property, it must be shown, in order to get an injunction, that there is a serious interference with the physical comfort of human existence, according to ordinary notions prevalent among reasonable English men and women[2]; and, in deciding on this point, the Court must look at the operations of the defendant in connection with the circumstances of the locality, and in particular with reference to the nature of the trades usually carried on there, and the noises and disturbances existing before defendant's operations commenced[3]; and if the Court finds a serious additional interference with the plaintiff's comfort, an injunction ought to be granted.[4] Thus, a person who resides in a neighbourhood devoted to a particular trade must put up with a certain amount of noise caused by that trade being carried on, and the standard of comfort must vary according to the situation of the property and the persons who inhabit it; but there may be such an addition to the noise as, with the noise already existing, will be more than a person can be reasonably expected to endure, even in the particular district, and in such a case it would be no defence to say that the neighbourhood is noisy and the machinery which causes the additional noise is first-class machinery and properly worked.[5] In *Rushmer* v.

[1] *Attorney General* v. *Cole* (1901), 1 Ch., 205; 70 L. J., Ch., 148; 83 L. T., 725.

[2] *Walter* v. *Selfe*, 4 De G. & S. at p. 322.

[3] *Sturges* v. *Bridgman*, 11 Ch. D., at p. 685; 48 L. J., Ch., at p. 791; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Ca., 642; 35 L. J., Q. B., 66.

[4] *Crump* v. *Lambert*, L. R., 3 Eq., 409; 47 L. T., 133; *Rushmer* v. *Polsue*, *post*, p. 463.

[5] Per Stirling & Cozens-Hardy, L.JJ., in *Rushmer* v. *Polsue*, *post*, p. 463.

Polsue,[1] the plaintiff had resided and carried on a dairy business, for seventeen years, in a house in the heart of a district off Fleet Street specially devoted to the printing trade, and had experienced a good deal of noise from printing machinery in the daytime but none at night. Defendants took the adjoining house, and there set up and worked printing machinery, which was of the most modern type and properly fixed and worked. The working of this machinery at night caused a serious disturbance to plaintiff, such as he had not previously experienced, and the Court granted an injunction to restrain defendants from so carrying on their printing business at the house adjoining that of the plaintiff as by reason of noise to cause a nuisance to the plaintiff as occupier of the house, and his family and servants.

Rushmer v. *Polsue.*

But, in all cases in which it is desired to restrain an alleged nuisance, the Court will only grant an injunction where the matter is clearly made out, upon determinate and satisfactory evidence, for if the evidence be conflicting, or the injury is doubtful, the Court will not thus interfere. And, as a general rule, and subject to what the Court in particular cases may consider just and convenient, for the Court to grant an injunction, the injury complained of must be such as from its nature is not susceptible of being adequately compensated by damages, or such as from its continuance, or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented except by an injunction.[2]

General principles as to granting injunctions against nuisances.

The reason that the Court interferes by injunction to restrain an infringement of a person's patent, copyright, or trade mark, is for the purpose of preventing irreparable mischief, and multiplicity of

Injunctions against infringement of patents, copyrights, and trade marks.

[1] *Rushmer* v. *Polsue* (1906), 1 Ch., 234; 75 L. J., Ch. 79; 93 L. T., 323.
[2] Story, 592.

suits; for it is evident that, if no other remedy could be given in such cases than an action for damages, the injured person might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.[1]

Patents.

The law as to patents is chiefly to be found in the Patents, Designs and Trade Marks Acts 1883 to 1902.[2] A patent may be granted for fourteen years, to the true and first inventor of any manufacture which is new within this realm.[3] For this purpose, manufacture means a saleable article produced by man; but the thing patented may be a new thing, like a medicine, or a telescope, or a new mechanism, or a new process by which articles are produced more cheaply and quickly.[4] The patent can be renewed for seven or fourteen years, on application to the Privy Council.[5] No action for infringement can be brought until the patent has been granted.[6] In any action for infringement, the plaintiff may claim an injunction, and either damages or an account of profits made.[7] The plaintiff must deliver, with his statement of claim, particulars of the breaches complained of; and the defendant must deliver, with his statement of defence, particulars of any objections on which he relies.[8] The defence may deny the infringement, and also deny the validity of the patent for reasons given in the particulars. The Court will even grant an inter-

[1] Story, 600, 602. As to patents, copyrights, and trade marks, generally, see Williams' Personal Property, Part II., Chap. 7; Goodeve's Personal Property, Chaps. 13-15.

[2] 46 & 47 Vict., c. 57; 48 & 49 Vict., c. 63; 49 & 50 Vict., c. 37; 51 & 52 Vict., c. 50; 1 Ed. VII., c. 18; 2 Ed. VII., c. 34.

[3] 21 Jac. I., c. 3, sec. 6; 46 & 47 Vict., c. 57, sec. 46.

[4] *King* v. *Wheeler*, 3 B. & Ald., 349; *Boulton* v. *Bull*, 2 H. B., 986; *Crane* v. *Price*, 4 M. & Gr., 580.

[5] 46 & 47 Vict., c. 57, sec. 25.

[6] *Ibid.*, sec. 15.

[7] *De Vitre* v. *Betts*, 6 H. L. Ca., 319.

[8] 46 & 47 Vict., c. 57, sec. 29.

locutory injunction, if the validity of the patent is not denied, or has been established in some prior action, or if the patent is an old one and uninterruptedly enjoyed[1]; but in other cases no interlocutory injunction will be granted, though defendant will be ordered to keep an account of profits.[2] At the trial, a perpetual injunction can be granted[3]; and if the judge gives a certificate that the validity of the patent came in question, the successful plaintiff will be entitled to solicitor and client costs in future actions for infringement.[4] If any person claiming to be a patentee threatens any other person with legal proceedings for an alleged infringement, any person aggrieved thereby may obtain an injunction and damages in respect of such threats on proof that there was not in fact any infringement, unless the party making the threat follows it up with due diligence by an action for infringement.[5]

Groundless threats.

The Trade Marks Act 1905[6] contains the law as to trade marks. A trade mark is defined as a mark used upon, or in connection with, goods, to indicate that they are the goods of the proprietor of such mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.[7] The title to a trade mark is obtained by registration; it can only be registered for particular goods or classes of goods[8]; and is only transferable with the goodwill of the business concerned with such goods, and expires with that goodwill.[9] A registrable trade mark must contain or consist of[10]—

Trade marks.

[1] *Dunlop Pneumatic Tyre Co.* v. *Hubbard* (1902), 19 R. P. C., 142.
[2] *Spencer* v. *Holt* (1903), 20 R. P. C., 142.
[3] 46 & 47 Vict., c. 57, sec. 30.
[4] *Ibid.*, sec. 31.
[5] *Ibid.*, sec. 32.
[6] 5 Ed. VII., c. 15.
[7] *Ibid.*, sec. 3.
[8] *Ibid.*, sec. 8.
[9] *Ibid.*, sec. 22.
[10] *Ibid.*, sec. 9.

(1) The name of a company, individual, or firm represented in a special or particular manner; or

(2) The signature of the applicant for registration, or some predecessor in his business; or

(3) An invented word or words; or

(4) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname; or

(5) Any other distinctive[1] mark, but a name or signature or word or words (unless it comes under the four preceding heads) shall not be deemed a distinctive[1] mark without an order of the Board of Trade or the Court; or

(6) Any special or distinctive[1] word or words, or letter, or numeral, or combination of letters or numerals, continuously used since before 13th August 1875.

The registration is for fourteen years, but can be renewed from time to time for a similar period.[2] Valid registration gives the exclusive right to the use of the trade mark.[3] In all legal proceedings, registration is *primâ facie* evidence of the validity of the mark,[4] and after seven years is conclusive evidence thereof unless the registration was obtained by fraud, or unless the use of the mark would be calculated to deceive or be otherwise disentitled to protection in a court of justice, or be contrary to law or morality, or a scandalous design.[5] The plaintiff in an action for infringement must prove registration, or else that his mark was in use before 13th August 1875 and has been refused registration.[6]

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[1] "Distinctive" means adapted to distinguish the proprietor's goods from those of other persons; and the extent to which user has rendered the mark in fact distinctive may be taken into consideration. 5 Ed. VII., c. 15, sec. 9.

[2] *Ibid.*, secs. 28, 29.

[3] *Ibid.*, sec. 39.

[4] *Ibid.*, sec. 40.

[5] *Ibid.*, sec. 41.

[6] *Ibid.*, sec. 42.

Copyright. Copyright is governed mainly by the Copyright Act 1842,[1] and exists in an author for the period of his life and seven years afterwards, or for the period of forty-two years from publication, whichever is the longer. No copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libellous, or obscene description; and, therefore, the Court will not interfere by injunction in cases where there is even a doubt that the work is of such a nature, until that doubt has been removed by a trial.[2] Registration at Stationers' Hall is a condition precedent to any action for infringement of copyright.[3]

Injunction against the publication of letters. Closely allied to the granting of injunctions to restrain the infringement of copyright, is the granting of injunctions to restrain the publication of letters without the consent of the writer. This the Court will do, not only where the letters form literary compositions, but also even in the case of merely private letters.[4] The law upon this subject is plain, and has long existed, and has been thus concisely stated:—"The property in letters remains in the person to whom they are sent. The right to retain them remains in the person to whom the letters are sent, but the sender of the letters has still that kind of interest, if not property, in the letters which gives him a right to restrain any use being made of the communications which he has made in the letters so sent by him. But there is one qualification, one exception it may be said, to that general principle, that is if the letters contain materials which it is necessary for the sendee to

[1] 5 & 6 Vict., c. 45.
[2] Story, 602.
[3] 5 & 6 Vict., c. 45, sec. 24; *Liverpool General Brokers' Association* v. *Commercial Press* (1897), 2 Q. B., 1; 66 L. J., Q. B., 405; 76 L. T., 292.
[4] *Earl of Lytton* v. *Devey*, 27 Ch. D., 28; 54 L. J., Ch., 293.

use for his own justification, or for vindicating his character from any charges which are brought against him."[1] When a letter is first published after the writer's death, the copyright is in the proprietor of the manuscript.[2]

Confidential communications.

The Court will restrain by injunction the disclosure of confidential communications, papers and secrets. So that solicitors, agents, accountants, merchants' clerks, business assistants, and similar persons will be restrained from making public, or communicating to a stranger, information acquired in their employment, and so will those who have acquired the information from such persons.[3] Thus, if a man who has a trade secret (*e.g.*, a secret medicine) employs persons under an express or implied contract or duty not to disclose it, he can prevent such persons and those to whom they communicated the secret from making use of it.[4] And this principle extends to all secret information acquired by a servant or clerk in the course of his employment.[5]

Other instances of injunctions.

Some few other particular instances in which the Court will interfere by granting an injunction may also be mentioned. An injunction will be granted to restrain the sailing of a ship contrary to agreement with another person, or where it would be contrary to good faith with other part owners.[6] In many cases where a person has expressly contracted not to do an act, the Court will also so interfere, *e.g.*, to prevent an actor from infringing an agreement

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[1] Per Bacon, V.C., in *Earl of Lytton* v. *Devey*, 27 Ch. D., 28; 54 L. J., Ch., 293; and see *Labouchere* v. *Hess*, 77 L. T., 559.
[2] *Macmillan* v. *Dent* (1905), 1 Ch., 101; 75 L. J., Ch., 99; 94 L. T., 88.
[3] Kerr on Injunctions, Chap. 11.
[4] *Morrison* v. *Moat*, 9 Ha., 241; 21 L. J., Ch., 248.
[5] *Robb* v. *Green* (1895), 2 Q. B., 315; 64 L. J., Q. B., 593; 73 L. T., 15.
[6] Story, 621.

whereby he has agreed in express terms to act exclusively at one place and not elsewhere[1]; or to prevent a person setting up a business contrary to a valid covenant he has entered into not to do so.[2] And if a person sells the goodwill of his business, and does not covenant not to carry on a similar business, although the Court will not restrain him from again setting up in business, it will restrain him from in any way representing that he is still carrying on the old business, and also from soliciting the customers of the former business to deal with him.[3]

Granting injunction a matter of discretion.

It does not follow that, in all cases in which a person has entered into a covenant not to do a certain thing, the Court will interfere, by injunction, to prevent a breach, although the covenant may be in itself perfectly legal; for the granting of the injunction is a matter of discretion, and the Court may consider it more equitable to refuse this relief, and leave the injured party to his remedy of an action for damages.[4] Thus, where a covenant is entered into by a servant, by which he expressly agrees during the term of his employment not to be concerned in any other business, although the covenant is legal, the Court will not grant an injunction.[5] To quote the words of Lord Justice Lindley: "The real difficulty which has always to be borne in mind when specific performance,

[1] *Lumley* v. *Wagner*, 1 De G., M. & G., 604. There must, however, be an express negative stipulation, *Whitwood Chemical Company* v. *Hardman* (1891), 2 Ch., 416; 60 L. J., Ch., 428; 64 L. T., 716; Story, 622. See *ante*, p. 295.

[2] Story, 617; *Dubowski* v. *Goldstein* (1896), 1 Q. B., 478; 74 L. T., 180.

[3] *Trego* v. *Hunt* (1896), A. C., 7; 65 L. J., Ch., 1; 73 L. T., 514. See also *ante*, p. 176; and *Gillingham* v. *Beddow* (1900), 2 Ch., 242; there referred to.

[4] See also *post*, pp. 474, 475.

[5] *Ehrmann* v. *Bartholomew* (1898), 1 Ch., 671; 67 L. J., Ch., 319; 78 L. T., 646; *Robinson* v. *Hewer* (1898), 2 Ch., 451; 67 L. J., Ch., 644; 79 L. T., 281.

or injunctions, to enforce agreements involving personal services are in question, is this—that this Court never will enforce an agreement by which one person undertakes to be the slave of another." [1]

Injunction to restrain fraudulent imitation.

An injunction will be granted, quite irrespective of trade mark, to prevent a person from fraudulently imitating the get-up of another's goods by means of labels, style, or name, or in any way so displaying or advertising his business or goods, as to deceive the public.[2] And if a person's goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intent to deceive by passing off his goods as those of another is unnecessary, since a man must be taken to have intended the reasonable and natural consequences of his own acts. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is, or may be, apparent innocence, was really intended to deceive.[3] If there is no evidence of express intention to deceive, and the case is simply one of colorable imitation, it is for the judge to decide, on the particular circumstances of each case, whether a person going into a shop as a customer would be likely to be deceived, and he does this by looking at the exhibits before him and the evidence adduced.[4] On the same principle, a person cannot take the name or style of another firm, and use it as his own in the same kind of business; for though there is no copyright in a name, to allow him to do this would

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[1] Per Lindley, L.J., in his Judgment in *Robinson* v. *Hewer* (1898), 2 Ch., 451; 67 L. J., Ch., 644; 79 L. T., 281.

[2] Story, 613.

[3] *Saxlehner* v. *Apollinaris Company* (1897), 1 Ch., 893; 66 L. J., Ch., 533; 76 L. T., 617.

[4] *Payton* v. *Snelling* (1901), 1 Ch., 135; 70 L. J., Ch., 644; 85 L. T., 287.

be to deceive the public, and this principle applies where, although the change of name was not originally made for the purpose of deceit, and with the intention of using the new name in the business in question, yet it is afterwards so sought to be used.[1] Nor is a manufacturer entitled to call his goods by a name, or description, which has become associated with the goods of another manufacturer, even though it may be just as much a substantially correct description of the goods he makes and sells, if the effect of the user of the name or description would be to mislead purchasers into the belief that they were buying the rival manufacturer's goods.[2] That this would be so must be shown as a fact, and the mere circumstance that that was the intention is not sufficient.[3] A person cannot, however, be restrained from using his own name, although it may be identical with that of another person engaged in the same kind of business, and who has acquired a reputation.[4] But a person may be restrained from selling his name to a company for the purpose of such company setting up business under his name, to the detriment of another person of the same name in a similar way of business.[5]

Reddaway v. *Benham.*

Lever v. *Bedingfield.*

Upon the principle that in a member's club each member has an interest therein in the nature of

When an injunction will be granted to restrain expulsion of member from a club.

[1] *Pinet & Cie* v. *Maison Louis Pinet* (1898), 1 Ch., 179; 67 L. J., Ch., 41; 77 L. T., 613. See also *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1899), A. C., 83; 68 L. J., Ch., 74; 79 L. T., 645.

[2] *Reddaway* v. *Banham & Company, Limited* (1896), A. C., 199; 65 L. J., Q. B., 381; 74 L. T., 289; *Birmingham Vinegar Brewery Company* v. *Powell* (1897), A. C., 910; 66 L. J., Ch., 763; 76 L. T., 792; *Valentine Meat Juice Company* v. *Valentine Extract Company*, 83 L. T., 259; *Singer Manufacturing Company* v. *British Empire Manufacturing Company* (1903), 20 R. P. C., 313.

[3] *Lever* v. *Bedingfield*, 80 L. T., 100.

[4] *Burgess* v. *Burgess*, 3 De G., M. & G., 896. Compare with this case the recent decision in *Cash, Limited* v. *Cash*, 82 L. T., 655; 86 L. T., 211.

[5] *Tussaud* v. *Tussaud*, 44 Ch. D., 678; 59 L. J., Ch., 631; 62 L. T., 633.

property, and that the committee are a quasi-judicial tribunal, and bound to act in accordance with the ordinary principles of justice, and to strictly follow out its rules, the Court has, in some cases, granted an injunction to restrain the expulsion of a member from the club.[1] Thus, in one case, a resolution had been passed to expel the plaintiff from the club, on the ground that his conduct was injurious to its interests, and on a motion to restrain the committee from interfering with the enjoyment by the plaintiff of the use and benefit of the club, the Court held, on the facts of the case, that the committee had not, as required by the rules, made full enquiry into the plaintiff's conduct; also that the plaintiff had had no notice of any definite charge, and that there were other irregularities in the course of procedure, so that the rules of the club had not been strictly complied with, and an injunction as asked by the plaintiff was granted.[2] But the Court will not interfere unless it can be shown that what has been done is contrary to the rules, or that there was *malâ fides*, or malice, in arriving at the decision, or that the rules are contrary to natural justice.[3] And the Court will not give any assistance by way of injunction in the case of a proprietary club, because the jurisdiction of the Court is based upon the right of property vested in the member; and in the case of a proprietary club there is no such right of property in the members, but they have each merely a right to use the club premises on payment of a subscription.[4]

Labouchere v. *Earl of Wharncliffe.*

Baird v. *Wells.*

The Court will restrain the publication of a libel.

Before the Judicature Acts it was held that the Court of Chancery had no power to grant an

[1] *Fisher* v. *Keane*, 11 Ch. D., 353; 49 L. J., Ch., 11; *Labouchere* v. *Earl of Wharncliffe*, 13 Ch. D., 346.
[2] *Labouchere* v. *Earl of Wharncliffe*, *supra*.
[3] *Dawkins* v. *Antrobus*, 17 Ch. D., 615; 44 L. T., 557.
[4] *Baird* v. *Wells*, 44 Ch. D., 661; 59 L. J., Ch., 673; 63 L. T., 312.

injunction to restrain the publication of a libel or slander, because its power was confined to cases where there was an injury, either actual or prospective, to property; but since the Judicature Acts it has been held that injunctions may be granted in such cases.[1] This jurisdiction, to the fullest extent, can only be said to have been recently thoroughly established, for at first the Court would only interfere by injunction in cases of libels affecting a man's property, trade, or business[2]; but in later cases it has been held that the Court can in its discretion interfere by injunction in any case.[3] Furthermore, it has been decided that the Court can even interfere by an interlocutory injunction[4]; but as this is a very strong step, practically anticipating the decision of a jury, it has been laid down that the jurisdiction ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not do so, the Court would set aside the verdict as unreasonable.[5] The Court will also interfere, by injunction, to restrain any publication in a newspaper pending the trial of an action, of matter which might tend to prejudice a fair trial, either by creating a bias in the public mind, or the mind of any particular person, or by influencing a witness who might be called at the trial.[6] In cases of trade libel or slander of title, involving the disparagement of a rival

Even on an interlocutory application sometimes.

Newspaper comments.

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[1] Story, 618.

[2] *Thorley's Cattle Food Company* v. *Massam*, 6 Ch. D., 582; 46 L. J., Ch., 713; *Thomas* v. *Williams*, 14 Ch. D., 864; 49 L. J., Ch., 605; *Hermann-Loog* v. *Bean*, 26 Ch. D., 306; 53 L. J., Ch., 1128; *Bonnard* v. *Perryman* (1891), 2 Ch., 269; 60 L. J., Ch., 617; 65 L. T., 506.

[3] *Salomons* v. *Knight* (1891), 2 Ch., 294; 60 L. J., Ch., 743; 64 L. T., 589.

[4] *Salomons* v. *Knight*, *supra*.

Bonnard v. *Perryman* (1891), *supra*; *Monson v. Tussaud* (1894), 1 Q. B., 671; 63 L. J., Q. B., 454; 70 L. T., 335.

[5] *Guilding* v. *Morel*, 84 *Law Times Newspaper*, 206; *Law Students' Journal*, February, 1889, p. 29.

trader's goods, no injunction will be awarded, unless special damage or imminent apprehension thereof can be proved as well as the falsity of the statements; and a mere puffing advertisement is not actionable.[1] Generally it must be borne in mind that, under the provisions of the Judicature Act 1873 before referred to,[2] the Court has a general discretion to grant an injunction in all cases in which it seems either just or convenient so to do, provided that there is some infringement of a legal or equitable right; and an injunction may be equally granted in any Division of the Court, whether that is the direct relief sought, or damages are the direct relief sought, and the injunction is only asked for as ancillary thereto.

When the Court will refuse an injunction.

But, as has already been pointed out, the granting of an injunction is a matter resting entirely in the discretion of the Court, and consequently no injunction will be granted if it will operate oppressively, or inequitably, or contrary to the real justice of the case. Thus, though the Court will ordinarily interfere to restrain waste, the Court will not do so where, though the act technically comes within the definition of waste, yet it is really of an ameliorative nature—that is, altering property in a way that does not injure, but rather tends to improve, it.[3] So, also, where a person has covenanted not to deal with his property in a certain manner, the object of such covenant being the protection of surrounding property belonging to the covenantee, and the covenantee by his own act or omission then causes a change in the nature or character of the surrounding property, which would render the

Bedford v. *British Museum.*

[1] *White* v. *Mellin* (1895), A. C., 154; 64 L. J., Ch., 308; 72 L. T., 334.

[2] See *ante*, p. 458.

[3] *Doherty* v. *Allman*, 3 App. Ca., 709; 26 W. R., 513.

enforcement of the restrictive covenant unreasonable, the Court will not grant an injunction.[1] And, in such a case, even though the change in the nature or character of the surrounding property has not been brought about by the covenantee's own act or omission, so that this principle would not apply, yet if the covenantee has been guilty of any acquiescence, or of laches in coming to the Court, an injunction will not be granted.[2]

Acquiescence and laches.

So also an injunction will not be granted to restrain the further erection of a building, where the partial erection has been acquiesced in, or encouraged by the party seeking the relief. Nor will an injunction be granted in cases of gross laches or delay by the party seeking the relief, in enforcing his rights, as where a patentee has lain by and allowed the infringement to go on for a long time without seeking redress. The Court constantly declines to lay down any rule which shall limit its power and discretion as to the particular cases in which injunctions shall be granted or withheld.[3]

Granting damages in addition to or instead of injunction.

In any action for an injunction, the Court has power, if it thinks fit, to award damages to the plaintiff, either in addition to, or in substitution for, such injunction.[4] The Court will generally award damages instead of granting an injunction, if the injury to the plaintiff's legal right is small, is capable of being estimated in money, can be adequately compensated by a small money payment, and the

[1] *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & R., 552; *Sayers* v. *Collyer*, 28 Ch. D., 103; 54 L. J., Ch., 1; 51 L. T., 723; *Knight* v. *Simmonds* (1896), 2 Ch., 294; 65 L. J., Ch., 583; 74 L. T., 563; *ante*, p. 301.

[2] *Sayers* v. *Collyer*, *supra*.

[3] Story, 623, 624.

[4] 21 & 22 Vict., c. 27; and though this Act was repealed by the Statute Law Revision Act 1883 (46 & 47 Vict., c. 49), its principle is preserved (*Sayers* v. *Collyer*, *supra*).

case is one in which it would be oppressive to grant an injunction.[1]

Different kinds of injunctions.

Injunctions may be either perpetual, or interlocutory. A perpetual injunction is granted at the hearing of a cause, and an interlocutory injunction is granted at some time previously to the hearing, to extend until the hearing, or for some less time. Before granting an interlocutory injunction the Court ought to be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiff is entitled to relief.[2] An interlocutory injunction is, in fact, granted for the purpose of keeping matters in *statu quo* until the hearing; and in cases of a very pressing nature, the Court even goes so far as to grant an *ex parte* injunction—that is, an injunction on the application of the plaintiff without notice to the defendant—for a short time, until the matter can be properly heard, so as to prevent an immediately threatened injury. In all cases of applications for interlocutory injunctions, however, the Court will only grant such an injunction upon the terms of the plaintiff undertaking to abide by such order as the Court may think fit to make thereafter, should it ultimately be of opinion that no injunction ought to have been granted and that damages have been caused thereby to the defendant. Where the plaintiff obtains an interlocutory injunction upon giving such an undertaking, the defendant is entitled to the benefit thereof, even though it should afterwards be decided that the injunction was wrongly granted by the mistake of the Court itself.[3]

Ex parte injunction.

Usual terms imposed on granting an interlocutory injunction.

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[1] *Shelfer* v. *City of London Electric Lighting Company* (*No. 1*) (1895), 1 Ch., 287; 64 L. J., Ch., 216; 72 L. T., 34.

[2] *Preston* v. *Luck*, 27 Ch. D., 497; 33 W. R., 317.

[3] *Griffiths* v. *Blake*, 27 Ch. D., 474; 53 L. J., Ch., 965; 50 L. T., 386.

Mandatory injunctions.

The Court will sometimes even grant a mandatory injunction, that is, one compelling the doing of a certain act for the purpose of restoring things to their former condition. Thus, where, after commencement of an action to restrain building operations, as infringing the plaintiff's right to light, the defendant has endeavoured to anticipate the Court's order by hurrying on the building, the Court can, and will in a proper case, order the erection to be pulled down.[1]

Enforcing injunction.

The remedy to enforce an injunction is ordinarily attachment, under which the Court can commit the person to prison for contempt, but it can also be enforced by sequestration. If an injunction is disobeyed recklessly, or intentionally, the Court will always commit the party for contempt on application being made to it so to do; but if the disobedience is merely casual and accidental, and the circumstances negative any suggestion of contumacy, though the Court will condemn the disobedient party in costs, it will refuse attachment of the person, or sequestration of his property.[2] The Court has jurisdiction to commit for contempt a person who is not a party to the action, and against whom no injunction has been granted, if it is shown that, with knowledge of the injunction, he has aided and abetted a breach of it.[3]

Writ of *Ne exeat regno*.

A writ of *Ne exeat regno*, being very much in the nature of an injunction, may properly be referred to here. It is a writ which is issued in certain cases,

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[1] *Gaskin* v. *Balls*, 13 Ch. D., 324. The injunction is framed in positive words, *Jackson* v. *Normanby Brick Company* (1899), 1 Ch., 438; 68 L. J., Ch., 407; 80 L. T., 482.

[2] *Fairclough* v. *Manchester Ship Canal Company*, C. A. (1897), W. N., 7; *Law Students' Journal*, March, 1897, p. 50.
Seaward v. *Patterson* (1897), 1 Ch., 545; 66 L. J., Ch., 267; 76 L. T., 215.

to prevent a person from leaving the realm. The origin of the writ is obscure, but undoubtedly in early times it was applied only to great political objects and purposes of State, for the safety or benefit of the realm. In later times, however, it came to be applied to merely civil purposes in aid of the administration of justice in cases of equitable debts and claims,[1] *e.g.*, to prevent a trustee leaving the country where he had not accounted to his *cestui que trust*. It was, however, only applied to equitable, and not to legal, claims, except in two cases, viz.: (1) Where alimony had been decreed to a wife; and (2) Where a balance was admitted by a defendant, but the plaintiff claimed a larger sum

Effect of the fusion of Law and Equity.

But Law and Equity being now fused by the Judicature Act 1873, there is no longer any practical distinction between an equitable and a legal debt. Therefore, as provision has been made by the Debtors Act 1869, for the arrest of a debtor in certain cases when he is going abroad,[2] the writ will only be issued in cases coming within its provisions; that is to say, the debt or claim must be to the extent of £50 at least, and, except in the case of a penalty arising otherwise than under a contract, it must be shown that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.[3]

Drover v. *Beyer.*

[1] Story, 1003-1006.

[2] 32 & 33 Vict., c. 62, sec. 6. See Indermaur's Principles of Common Law, 381.

[3] *Drover* v. *Beyer*, 13 Ch. D., 242; 49 L. J., Ch., 37; 41 L. T., 393.

CHAPTER VIII.

JURISDICTION OF THE COURT OF AN EXCEPTIONAL NATURE.

Action to perpetuate testimony.

In certain cases the Court will entertain an action brought by a person, not to obtain redress in respect of an injury, or to enforce a right, but merely to perpetuate or preserve testimony. In doing this, the Court of Chancery was said to act merely in an auxiliary manner, for the matter might be one within the jurisdiction of the Courts of Common Law, and all that the Court of Chancery did was to preserve evidence to enable the person to prosecute his right there at a later time.

The essence of such an action.

The essence of a proceeding of this character has always been that the plaintiff has some right which he cannot yet litigate,[1] and that he fears that when the day arrives for litigation, the evidence which would support his right may be no longer obtainable, through death of the witnesses or otherwise. In such cases, the Court will allow the evidence to be taken, that it may be preserved for the future day when the litigation takes place. The plaintiff must have some real interest in the matter in respect of which he desires to perpetuate evidence, and if his interest is capable of being immediately barred by the defendant, the Court will not give the relief sought; thus the Court will not entertain such an action brought by a remainderman against a tenant-in-tail in possession.[2]

[1] *West* v. *Sackville* (1903), 2 Ch., 378; 72 L. J., Ch., 699; 88 L. T., 814.

[2] Story, 1027.

Extent of the jurisdiction.

Originally the Court would only perpetuate testimony in respect of an actual right to either real or personal property[1]; but it was afterwards enabled to do so in respect even of a mere chance of succession, *e.g.*, on behalf of an heir-at-law, or in respect of an honour, title, or dignity.[2]

Action to perpetuate testimony not ordinarily brought to a hearing.

An action to perpetuate testimony is not ordinarily brought to a hearing, for there is nothing to hear, the whole design being the preservation of the evidence. When the evidence is taken, the proceedings usually terminate, and the plaintiff pays the defendant's costs, unless, indeed, the defendant has taken advantage of the proceedings to perpetuate testimony also on his own behalf, when usually each party pays his own costs. But this is only a general rule, and the costs of an action to perpetuate testimony are, as in other actions, in the discretion of the Court, and it would appear that either of the parties is entitled, if he so desire, to bring the action to trial, for the purpose of determining the question of costs.[3]

When a person may use evidence so taken.

To entitle a party in subsequent litigation to use evidence that has been taken in an action to perpetuate testimony, he must, unless the other party consents to it being used, show that the deponent is dead, or beyond the jurisdiction of the Court, or unable, from sickness or other infirmity, to attend the trial.[4]

Bill to take evidence *de bene esse*.

There was formerly another kind of proceeding with reference to evidence, called a bill to take

[1] *Townshend Peerage Case*, 10 Cl. & Fin., 289; *Dursley* v. *Fitzhardinge*, 6 Ves., 251.

[2] 5 & 6 Vict., c. 69. This statute was repealed by the Statute Law Revision Act 1883 (46 & 47 Vict., c. 49), but its provisions are in substance now contained in Order XXXVII., Rules 35-38, which regulate the practice on the subject.

[3] Indermaur's Manual of Practice, 246, 247.

[4] Order XXXVII., Rule 18.

evidence *de bene esse*. This was a suit brought in Chancery, when an action was pending at Common Law, asking to have the evidence taken of aged or infirm witnesses, or of a witness going abroad, or of a single witness in support of a case, even though not aged or infirm or going abroad. The idea was that before the trial could come on the evidence might be lost, and the Court of Chancery, therefore, here acted as an auxiliary to the Courts of Common Law. The broad distinction between a bill to take evidence *de bene esse* and a bill to perpetuate testimony was, that the latter could only be brought in respect of a future right which could not be litigated at that time, whilst a bill to take evidence *de bene esse* could only be brought when an action was pending, and not before.[1]

Now obsolete.

By reason of powers given by various statutes to the Courts of Law to examine witnesses before trial, the jurisdiction of the Court of Chancery to take evidence *de bene esse* has long been practically obsolete, and such an action could not be maintained now, the Division in which the action is pending having full power, on an interlocutory application, in the particular action, to order the examination upon oath before the Court, or any judge, or any officer of the Court or any other person, and at any place, of any witness or person.[2]

Discovery.

Another matter of special relief formerly given by the Court of Chancery has also long become obsolete in like manner, viz., Discovery. Of course, in a sense, in nearly every proceeding in Equity, discovery is a part of the relief sought—that is using the word in its widest application; but by a Bill for Discovery, strictly so called, was meant a bill which asked for

[1] Story, 1029, 1030.
[2] Order XXXVII., Rule 5; Indermaur's Manual of Practice, 184.

no relief, but which simply sought the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things, in the possession or power of the defendant, in order to maintain the right or title of the party asking it in some suit or proceeding at law.[1] Here, again, the Court of Chancery acted as an auxiliary to the Courts of Common Law, and enabled the plaintiff to get what he sought, and then, informed and strengthened by that, to return to the Common Law Court and proceed with his action there. The plaintiff, however, was indulging in something outside the action, and had to pay his own costs of getting the discovery. But Bills for Discovery have long been obsolete, power having been conferred, by various Statutes, on the Courts of Common Law, of granting discovery as an interlocutory step in the existing action; and there are, of course, now full provisions to this effect under the existing Judicature practice.[2] It has been decided that our Courts will not grant discovery in aid of proceedings in a foreign court.[3]

Obsolete.

Proceedings to establish wills.

The Court of Chancery has never had any general jurisdiction over wills, and the proper tribunal at the present day with regard to them, is the Probate Division of the High Court of Justice. In some cases, however, the Court has exercised a practical jurisdiction, founded upon considerations of suppressing interminable litigation, and to give security and repose to titles, by enquiring, at the instance of devisees and others, into the validity of a will, and establishing it, and granting a perpetual injunction against the heir-at-law and others, to restrain them

[1] Story, 1010.
[2] See Indermaur's Manual of Practice, 133-147.
[3] *Dreyfus* v. *Peruvian Guano Company*, 41 Ch. D., 151; 58 L. J., Ch., 471; 60 L. T., 216.

from contesting its validity in future.[1] It appears useless to consider the details of the principles on which the Court formerly acted in this manner, for the validity of nearly all wills may now be determined in the Probate Division.[2] It must be borne in mind, however, that the Probate Division has until lately had no jurisdiction over a will dealing only with real estate, and not containing the appointment of an executor, and this even although the will directed a conversion of the real estate.[3] In exceptional cases of this kind, therefore, an action has hitherto been allowed to be brought in the Chancery Division, in the nature of a bill to establish the will, being by the devisee under the will against the heir-at-law.[4] But as regards deaths occurring on and after 1st January, 1898, the Land Transfer Act 1897[5] now specially provides that probate, and letters of administration, may be granted in respect of real estate only, although there is no personal estate, and the jurisdiction of the Chancery Division, as just mentioned, will, therefore, no doubt, be no longer exercised in cases coming within the Act, and may be treated as obsolete. Where a devisee does not want strictly to establish a will in Chancery, but fears that he may hereafter be attacked by the heir-at-law, he has hitherto been allowed to bring an action against the heir to perpetuate the testimony of the witnesses thereto, and it is apprehended that such a proceeding will still be allowed notwithstanding the provision of the Land Transfer Act 1897. Such a proceeding as this is what is meant by proving a will in Chancery, and the rule is that

When Probate Division has no jurisdiction.

Provision of Land Transfer Act 1897 hereon.

Proving a will in Chancery.

[1] Story, 990, 991.
[2] *Allen* v. *McPherson*, 1 H. L. Cas., 191; *Melluish* v. *Milton*, 3 Ch. D., 27; 45 L. J., Ch., 836.
[3] *In the goods of Jane Barden*, L. R., 1 P. & D., 325.
[4] *In the goods of Jordan*, L. R., 1 P. & D., 555; 37 L. J., P. & M., 22.
[5] 60 & 61 Vict., c. 65, sec. 1 (3).

the heir is entitled to his costs even though he disputes the will.[1]

Action in the nature of a Bill of Peace.

The Court of Chancery has long exercised a jurisdiction in respect of what has been known as a Bill of Peace, and which would now be styled an action in the nature of a Bill of Peace, a proceeding of rare practical occurrence. It is a proceeding in which the plaintiff seeks to establish, and perpetuate, a right which he claims. The Court will entertain such an action when the matter involved is one which, from its nature, may be controverted by different persons, at different times, and in different actions, or when several attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in his title, if it is already, or can be now, sufficiently established.[2]

Instances.

An action of this nature may be brought for tithes, by a parson against his parishioners; by parishioners against a parson to establish a modus; by a lord of a manor against his tenants for an encroachment under colour of a common right; by tenants of a manor against the lord for disturbance of a common right; by a party interested to establish a toll due by custom; or by a person having a right which he has repeatedly established by trial in the ordinary way, and yet there is a danger of future litigation and obstruction to his right, from new attempts to controvert it. So also where a party has possession, and claims a right of fishery for a considerable distance on a river, and the riparian proprietors set up adverse rights, he may bring such an action against all of them to establish his right,

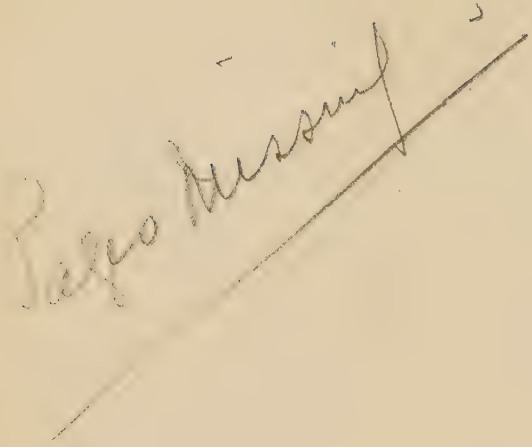
[1] Story, 994, 1025.
[2] *Ibid.*, 566.

and quiet his possession. And such an action will also lie to settle the amount of a general fine to be paid by all the copyhold tenants of a manor.[1]

Reason for the proceedings.

The obvious reason for the exercise by the Court of this extraordinary jurisdiction is, upon the *Quia timet* principle,[2] to procure repose from what might prove to be perpetual litigation, and, therefore, the proceeding was justly called a Bill of Peace. A general doctrine of public policy is, that an end ought to be put to litigation, and, above all, to fruitless litigation. If actions might be continually brought to litigate the same questions as often as the parties choose, it is evident that remedial justice would soon become a mockery, for the termination of one action would only become the signal for the institution of a new one, and the expenses might become ruinous to all the parties. The Court, by exercising the jurisdiction it does, is enabled to suppress useless litigation, and to prevent multiplicity of suits.[3]

[1] Story, 567, 568.
[2] See *ante*, p. 277.
[3] Story, 566, 567.



prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order :

(*n*) In nominal or inscribed stock issued, or to be issued, by any commissioners incorporated by Act of Parliament for the purpose of supplying water and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied :

(*o*) In any of the stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court, and may also from time to time vary any such investment.

Purchase at a premium of redeemable stocks.

2.—(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

Discretion of trustees.

3.—Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Application of preceding sections.

4.—The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Enlargement of express powers of investment.

5.—(1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(*a*) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) On any charge; or upon mortgage of any charge, made under the Improvement of Land Act 1864.

27 & 28 Vict., c. 114.

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act 1875.

38 & 39 Vict., c. 83.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act 1880.

43 & 44 Vict., c. 8.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act 1865. 28 & 29 Vict., c. 78.

Power to invest, notwithstanding drainage charges. 10 & 11 Vict., c. 32.

6.—A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts 1846 to 1856, or the Landed Property Improvement (Ireland) Act 1847, or by an absolute order made under the Improvement of Land Act 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

Trustees not to convert inscribed stock into certificates to bearer. 26 & 27 Vict., c. 73. 33 & 34 Vict., c. 71. 38 & 39 Vict., c. 83. 40 & 41 Vict., c. 59.

7.—(1) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(*a*) The India Stock Certificate Act 1863;

(*b*) The National Debt Act 1870;

(*c*) The Local Loans Act 1875;

(*d*) The Colonial Stock Act 1877.

(2) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Loans and investments by trustees not chargeable as breaches of trust.

8.—(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed

to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

Liability for loss by reason of improper investments.

9.—(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight.

PART II.

Various Powers and Duties of Trustees.

Appointment of New Trustees.

Power of appointing new trustees.

10.—(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being or the personal representatives of the last surviving or continuing trustee may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable as aforesaid.

(2) On the appointment of a new trustee for the whole or any part of trust property—

(*a*) The number of trustees may be increased; and

(*b*) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(*c*) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was

originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(*d*) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This section applies to trusts created either before or after the commencement of this Act.

Retirement of trustee.

11.—(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any,

creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act.

Vesting of trust property in new or continuing trustees.

12.—(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall without any conveyance or assignment operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry the person or persons making the declaration shall be deemed the conveying party or parties and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13.—(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3) This section applies only to a trust or power created by an instrument coming into operation after the thirty-first of December one thousand eight hundred and eighty-one.

Power to sell subject to depreciatory conditions.

14.—(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This section applies only to sales made after the twenty-fourth day of December one thousand eight hundred and eighty-eight.

15.—A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act 1874. Power to sell under 37 & 38 Vict., c. 78.

16.—When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*. Married woman as bare trustee may convey.

Various Powers and Liabilities.

17.—(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. Power to authorise receipt of money by banker or solicitor. 44 & 45 Vict., c. 41.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4) This section applies only where the money or valuable consideration or property is received after the

twenty-fourth day of December one thousand eight hundred and eighty-eight.

(5) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Power to insure building.

18.—(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Power of trustees of renewable leaseholds to renew and raise money for the purpose.

19.—(1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and, shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless

the consent in writing of that person is obtained to the renewal on the part of the trustee.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Power of trustee to give receipts.

20.—(1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section applies to trusts created either before or after the commencement of this Act.

Power for executors and trustees to compound,&c.

21.—(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property real or personal, claimed, and may allow any

time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4) This section applies to executorships, administratorships and trusts constituted or created either before or after the commencement of this Act.

Powers of two or more trustees.

22.—(1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2) This section applies only to trusts constituted after or created by instruments coming into operation after the thirty-first day of December one thousand eight hundred and eighty-one.

Exoneration of trustees in respect of certain powers of attorney.

23.—A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Implied indemnity of trustees.

24.—A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

PART III.

Powers of the Court.

Appointment of New Trustees and Vesting Orders.

Power of the Court to appoint new trustees.

25.—(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

Vesting orders as to land.

26.—In any of the following cases, namely:—

(i) Where the High Court appoints or has appointed a new trustee; and

(ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(*a*) Is an infant, or

(*b*) Is out of the jurisdiction of the High Court, or

(*c*) Cannot be found; and

(iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(*a*) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(*b*) Where the order relates to a trustee entitled jointly

with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Orders as to contingent rights of unborn persons.

27.—Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

Vesting order in place of conveyance by infant mortgagee.

28.—Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29.—Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely :—

(*a*) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found ; and

(*b*) Where an heir or personal representative or devisee or the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land, has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled ; and

(*c*) Where it is uncertain which of several devisees of the mortgagee was the survivor ; and

(*d*) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

Vesting order consequential on judgment for sale or mortgage of land.

30.—Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made, and is a party to the action or proceeding in which the judgment or order is given, or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estates as that Court thinks fit in the purchaser or mortgagee or in any other person.

Vesting order consequential on judgment for specific performance, &c.

31.—Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Effect of vesting order.

32.—A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Power to appoint person to convey.

33.—In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Effect of vesting order as to copyhold.

34.—(1) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land: and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof as if the persons in whose place an appointment is made were free from disability, and had executed and done those assurances and things.

Vesting orders as to stock and choses in action.

35.—(1) In any of the following cases, namely:—

(i) Where the High Court appoints or has appointed a new trustee; and

(ii) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(*a*) Is an infant, or

(*b*) Is out of the jurisdiction of the High Court, or

(*c*) Cannot be found; or

(*d*) Neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

(*e*) Neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(*a*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(2) In all cases where a vesting order can be made under this section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the

Court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Persons entitled to apply for orders.

36.—(1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Powers of new trustee appointed by Court.

37.—Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Power to charge costs on trust estate.

38. –The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to

any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

Trustees of charities.

39.—The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict., c. 5.

40.—Where a vesting order is made as to any land under this Act or under the Lunacy Act 1890, or under any Act relating to Lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

Application of vesting order to land out of England.

41.—The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions except Scotland.

Payment into Court by Trustees.

Payment into Court by trustees.

42.—(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities

belonging to a trust, may pay the same into the High Court, and the same shall, subject to rules of Court, be dealt with according to the Orders of the High Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Miscellaneous.

Power to give judgment in absence of a trustee.

43.—Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Power to sanction sale of land or minerals separately.

44.—(1) Where a trustee is for the time being authorised to dispose of land by way of sale, exchange, partition or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the

minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2) Any such trustee with the said sanction previously obtained, may unless forbidden by the instrument creating the trust or direction from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts 1882 to 1890, or otherwise.

Power to make beneficiary indemnify for breach of trust.

45.—(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the twenty-fourth day of December one thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

Jurisdiction of Palatine and County Courts.

46.—The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a Palatine Court or County Court, include that Court, and the procedure under this Act in Palatine Courts and County Courts shall be in accordance with the Acts and rules regulating the procedure of those Courts.

PART IV.

Miscellaneous and Supplemental.

Application to trustees under

47.—(1) All the powers and provisions contained in this Act with reference to the appointment of new trustees

and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Lands Act 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement. Settled Land Acts of provisions as to appointment of trustees.

(2) This section applies and is to have effect with respect to an appointment or discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of the Conveyancing and Law of Property Act 1881. 44 & 45 Vict., c. 41.

48.—Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee. Trust estates not affected by trustee becoming a convict. 33 & 34 Vict., c. 23.

49.—This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same. Indemnity.

50.—In this Act, unless the context otherwise requires,— Definitions.

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of

entry, whether immediate or future, and whether vested or contingent :

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise, transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants-in-tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land :

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description :

The expression "instrument" includes Acts of Parliament :

The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land :

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in Equity as merely a security for money, and every person deriving title under the original mortgagee :

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connection with the expression "into Court" include the deposit or transfer of the same in or into Court :

The expression "possessed" applies to receipt of income of, and to any vested estate less than a

life estate, legal or equitable, in possession or in expectancy, in any land :

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not :

The expression "rights" includes estates and interests :

The expression "securities" includes stocks, funds, and shares; and so far as relates to payments into Court has the same meaning as in the Court of Chancery (Funds) Act 1872 : 35 & 36 Vict., c. 44.

The expression "stock" includes fully paid up shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein :

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee :

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

51.—The Acts mentioned in the Schedule to this Act are hereby repealed except as to Scotland to the extent mentioned in the third column of that Schedule. Repeal.

52.—This Act does not extend to Scotland. Extent of Act.

53.—This Act may be cited as the Trustee Act 1893. Short title.

54.—This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four. Commencement.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. III., c. 52	The Legacy Duty Act 1796.	Section 32.
9 & 10 Vict., c. 101	The Public Money Drainage Act 1846.	Section 37.
10 & 11 Vict., c. 32	The Landed Property Improvement (Ireland) Act 1847.	Section 53.
10 & 11 Vict., c. 96	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict., c. 68	An Act for extending to Ireland an Act passed in the last Session of Parliament, entitled "An Act for better securing trust funds, and for the relief of trustees."	The whole Act.
12 & 13 Vict., c. 74	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict., c. 60	The Trustee Act 1850.	Sections 7 to 19, 22 to 25, 29, 32 to 36, 46, 47, 49, 54 and 55; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
15 & 16 Vict., c. 55	The Trustee Act 1852.	Sections 1 to 5, 8 and 9; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict., c. 82	The Court of Chancery of Lancaster Act 1854.	Section 11.
18 & 19 Vict., c. 91	The Merchant Shipping Act Amendment Act 1855.	Section 10, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
20 & 21 Vict., c. 60	The Irish Bankrupt and Insolvent Act 1857.	Section 322.
22 & 23 Vict., c. 35	The Law of Property Amendment Act 1859.	Sections 26, 30 and 31.
23 & 24 Vict., c. 38	The Law of Property Amendment Act 1860.	Section 9.
25 & 26 Vict., c. 108	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict., c. 73	An Act to give further facilities to the holders of Indian Stock.	Section 4.
27 & 28 Vict., c. 114	The Improvement of Land Act 1864.	Section 60 so far as it relates to trustees; and section 61.
28 & 29 Vict., c. 78	The Mortgage Debenture Act 1865.	Section 40.
31 & 32 Vict., c. 40	The Partition Act 1868.	Section 7.
33 & 34 Vict., c. 71	The National Debt Act 1870.	Section 29.
34 & 35 Vict., c. 27	The Debenture Stock Act 1871.	The whole Act.
37 & 38 Vict., c. 78	The Vendor and Purchaser Act 1874.	Sections 3 and 6.
38 & 39 Vict., c. 83	The Local Loans Act 1875.	Sections 21 and 27.
40 & 41 Vict., c. 59	The Colonial Stock Act 1877.	Section 12.
43 & 44 Vict., c. 8	The Isle of Man Loans Act 1880.	Section 7 so far as it relates to trustees.
44 & 45 Vict., c. 41	The Conveyancing and Law of Property Act 1881.	Sections 31 to 38.
45 & 46 Vict., c. 39	The Conveyancing Act 1882.	Section 5.
46 & 47 Vict., c. 52	The Bankruptcy Act 1883.	Section 147.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
51 & 52 Vict., c. 59	The Trustee Act 1888.	The whole Act, except sections 1 and 8.
52 & 53 Vict., c. 32	The Trust Investment Act 1889.	The whole Act, except sections 1 and 7.
52 & 53 Vict., c. 47	The Palatine Court of Durham Act 1889.	Section 8.
53 & 54 Vict., c. 5	The Lunacy Act 1890.	Section 140.
53 & 54 Vict., c. 69	The Settled Land Act 1890.	Section 17.
55 & 56 Vict., c. 13	The Conveyancing and Law of Property Act 1892.	Section 6.

(2). TRUSTEE ACT 1893 AMENDMENT ACT 1894.

[57 VICT., CAP. 10.]

(See *ante*, p. 122.)

An Act to Amend the Trustee Act 1893.

[18th June 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Amendment of 56 & 57 Vict., c. 53, sec. 30.

1.—In section thirty of the Trustee Act 1893 the words "as heir, or under the will of a deceased person, for "payment of whose debts the judgment was given or "order made" shall be repealed.

Extension to Ireland of 56 & 57 Vict., c. 53, sec. 41.

2.—The powers conferred on the High Court in England by section forty-one of the Trustee Act 1893 to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Amendment of 56 & 57 Vict., c. 53, sec. 44.

3.—In section forty-four of the Trustee Act 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

Liability of trustee in case of change of character of investment.

4.—A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.

Short title

5.—This Act may be cited as the Trustee Act 1893 Amendment Act 1894.

(3). JUDICIAL TRUSTEES ACT 1896.

[59 & 60 Vict., cap. 35.]

(See *ante*, page 122.)

ARRANGEMENT OF SECTIONS.

Section.
1. Power of Court on application to appoint judicial trustees.
2. Court to exercise jurisdiction.
3. Jurisdiction of Court in cases of breach of trust.
4. Rules.
5. Definitions.
6. Short title, extent, and commencement of Act.

An Act to provide for the Appointment of Judicial Trustees and otherwise to amend the Law respecting the Administration of Trusts and the Liability of Trustees.

[14th August, 1896.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power of Court on application to appoint judicial trustee.

1.—(1) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

(2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the

Court is not satisfied of the fitness of a person so nominated an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof.

(4) The Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof.

(5) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

(6) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the Court by the prescribed persons, and in any case, where the Court shall so direct, an enquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

Court to exercise jurisdiction.

2.—The jurisdiction of the Court under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a Palatine Court, and (subject to the prescribed definition of the jurisdiction) by any County Court judge to whom such jurisdiction may be assigned under this Act.

Jurisdiction of Court in cases of breach of trust.

3.—(1) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2) This section shall come into operation at the passing of this Act.

Rules.

4.—(1) Rules may be made for carrying into effect this Act, and especially—

(1) For requiring judicial trustees, who are not officials of the Court, to give security for the due application of any trust property under their control:

(2) Respecting the safety of the trust property, and the custody thereof:

(3) Respecting the remuneration of judicial trustees and for fixing and regulating the fees to be taken under this Act so as to cover the expenses of the administration of this Act, and respecting the payment of such remuneration and fees out of the trust property, and, where the judicial trustee is an official of the Court, respecting the application of the remuneration and fees payable to him:

(4) For dispensing with formal proof of facts in proper cases:

(5) For facilitating the discharge by the Court of administrative duties under this Act without judicial proceedings, and otherwise regulating procedure under this Act and making it simple and inexpensive:

(6) For assigning jurisdiction under this Act to County Court judges and defining such jurisdiction:

(7) Respecting the suspension or removal of any judicial trustee, and the succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in such person of any trust property:

(8) Respecting the classes of trusts in which officials of the Court are not to be judicial trustees, or are to be so temporarily or conditionally:

(9) Respecting the procedure to be followed where the judicial trustee is executor or administrator:

(10) For preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity:

(11) For the filing and auditing of the accounts of any trust of which a judicial trustee has been appointed.

(2) The rules under this Act may be made by the Lord Chancellor, subject to the consent of the Treasury in matters relating to fees and to salaries and numbers of officers, and to the consent of the authority for making orders under the Solicitors' Remuneration Act 1881, in matters relating to the remuneration of solicitors. The rules shall be laid before Parliament and have the same force as if enacted in this Act, provided that if, within thirty days after such rules have been laid before either House of Parliament during which that House has sat, the House presents to Her Majesty an address against such rules or any of them, such rules or the rule specified in the address shall thenceforward be of no effect.

44 & 45 Vict., c. 44.

Definitions.

5.—In this Act—

The expression "official of the Court" means the holder of such paid office in or connected with the Court as may be prescribed.

The expression "prescribed" means prescribed by rules under this Act.

Short title, extent, and commencement of Act.

6.—(1) This Act may be cited as the Judicial Trustees Act 1896.

(2) This Act shall not extend to any charity, whether subject to or exempted from the Charitable Trusts Acts 1853 to 1894.

(3) This Act shall not extend to Scotland or Ireland.

(4) This Act, except as by this Act otherwise provided, shall come into operation on the first day of May, one thousand eight hundred and ninety-seven.

(4). EPITOME OF THE RULES UNDER THE JUDICIAL TRUSTEES ACT 1896.

(See *ante*, page 122.)

The following are the most prominent points on these rules:—

Applications generally under this Act are to be in the Chancery Division, by interlocutory summons, if there is any pending matter, and, if there is not, by an originating summons. Such summonses may also be taken out in District Registries. Applications may be made to a Palatine Court as respects trusts within the jurisdiction of that Court, and to a County Court where the trust property does not exceed in value £500 (Rules 2, 29, 30, and 31). An application to a County Court can only be made to a Metropolitan County Court, or to a County Court exercising bankruptcy jurisdiction (Rule 31). The summons when taken out is, if the application is made on behalf of a trustee, to be served upon any other trustee; and, where the application is made on behalf of a beneficiary, on the trustee; and in either case, on such of the beneficiaries as the Court may direct. If the application is made by a person intending to create a trust, the summons need not be served on anybody (Rule 2).

When an application is made by originating summons, a written statement must be signed by the applicant containing various particulars, namely:—A description of the trusts; the name and address of any person nominated as judicial trustee, with the reasons that lead to his nomination; whether it is proposed he should be remunerated or not; and general particulars of the trust property and of the beneficiaries. This statement must be verified by affidavit, which is to be *primâ facie* evidence in support of the application (Rule 4).

From the Act, it will be observed that an official of the Court or a private person may be appointed a judicial trustee. It is specially provided (Rule 5) that the Court is not to be precluded from appointing a person to be a

judicial trustee by reason only of his being a beneficiary or a relative, or the solicitor to the trust, or to the trustee or any beneficiary, or by reason of being a married woman, and that an existing trustee may be appointed a judicial trustee; and (Rule 25) that any person who is an executor or administrator may be appointed a judicial trustee for the purpose of the collection and administration of the estate of the deceased person.

Where an official of the Court is appointed, the official solicitor of the Court is generally to be such person, and the property is to be held by him under his official title, and if he dies or ceases to hold office, his successor is to become judicial trustee (Rule 7). There is no provision for the official giving security; but if the judicial trustee is not an official, he must give security in the usual manner (Rule 8), unless he is an administrator who has already given an administration bond (Rule 25). The Court has, however, power to dispense with security (Rule 8).

The judicial trustee is to keep a separate account at some bank approved by the Court, and all title deeds, &c., are to be deposited with the bank, or as the Court may direct. Where, however, an official of the Court is appointed, the Court may, if it thinks fit, direct that all receipts and payments shall be made in such manner, and subject to such regulations, as the Treasury may direct (Rule 10). A judicial trustee must pay into the bank all moneys coming into his hands, and if he keeps any money in his hands for a longer time than is necessary he is to be liable to pay interest at not exceeding 5 per cent. (Rule 11). The judicial trustee may at any time request the Court to give him directions as to the trusts or its administration, laying the necessary facts before the Court (Rule 12). It is not necessary for this purpose to take out a summons, unless specially directed, but application may be made by letter addressed to the officer of the Court without any further formality, and the Court may give directions by letter signed by the "officer of the Court" and addressed to the trustee without drawing up any order (Rule 28).

With regard to accounts and remuneration, the Court is

to direct when the accounts are to be made up, and to fix in each year the time within which they are to be delivered to it for audit, which audit is to be by an officer of the Court, with power to refer to a professional accountant (Rule 14). The remuneration (if any) is to be fixed by the Court, and special allowances may be made as follows:—(*a*) for the statement of the trust property prepared by the judicial trustee on his appointment, an allowance not exceeding 10 guineas; (*b*) for realizing and investing trust property where the property is realized for the purpose of re-investment, an allowance not exceeding $1\frac{1}{2}$ per cent.; (*c*) for realizing or investing trust property in any other case, an allowance not exceeding 1 per cent.

The Court may also in any year make a special allowance to a judicial trustee by reason of exceptional circumstances. These allowances may be paid in addition to any regular remuneration (Rule 17). Of course where a judicial trustee is a private person, these profits are for him; but where an official of the Court is appointed, all remuneration and allowances are to be paid, accounted for, and applied as the Treasury directs (Rule 18). The Court has also the power to forfeit the whole of the remuneration of the judicial trustee on account of misconduct (Rule 19).

The Court has power to suspend the judicial trustee if expedient (Rule 20), or to remove him (Rule 21), and provision is made for the resignation of the judicial trustee and the appointment of another in his place (Rules 23 and 24).

With regard to the expression "officer of the Court," made use of in the Rules, this means—in the High Court, the proper Chancery Master, in a District Registry, any Registrar of that Registry, in a Palatine Court, any Registrar of that Court, and in the County Court the Registrar of the County Court (Rule 33).

The Rules are to be construed with all existing rules of the Court in which the application is made; and the Interpretation Act 1889 is to apply to the meaning of expressions in them as it does to Acts of Parliament (Rules, 34, 35).

(5). PARTNERSHIP ACT 1890. [53 & 54 VICT., CAP. 39.]

(See *ante*, page 168.)

ARRANGEMENT OF SECTIONS.

Section.

Nature of Partnership.

1. Definition of partnership.
2. Rules for determining existence of partnership.
3. Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.
4. Meaning of firm.

Relations of Partners to persons dealing with them.

5. Power of partner to bind the firm.
6. Partners bound by acts on behalf of firm.
7. Partner using credit of firm for private purposes.
8. Effect of notice that firm will not be bound by acts of partner.
9. Liability of partners.
10. Liability of the firm for wrongs.
11. Misapplication of money or property received for or in custody of the firm.
12. Liability for wrongs joint and several.
13. Improper employment of trust property for partnership purposes.
14. Persons liable by "holding out."
15. Admissions and representations of partners.
16. Notice to acting partner to be notice to the firm.
17. Liabilities of incoming and outgoing partners.
18. Revocation of continuing guaranty by change in firm.

Relations of Partners to one another.

19. Variation by consent of terms of partnership.
20. Partnership property.
21. Property bought with partnership money.
22. Conversion into personal estate of land held as partnership property.
23. Procedure against partnership property for a partner's separate judgment debt.
24. Rules as to interests and duties of partners, subject to special agreement.

Section.
25. Expulsion of partner.
26. Retirement from partnership at will.
27. Where partnership for term is continued over continuance on old terms presumed.
28. Duty of partners to render accounts, &c.
29. Accountability of partners for private profits.
30. Duty of partner not to compete with firm.
31. Rights of assignee of share in partnership.

Dissolution of Partnership, and its consequences.
32. Dissolution by expiration or notice.
33. Dissolution by bankruptcy, death, or charge.
34. Dissolution by illegality of partnership.
35. Dissolution by the Court.
36. Right of persons dealing with firm against apparent members of firm.
37. Rights of partners to notify dissolution.
38. Continuing authority of partners for purposes of winding-up.
39. Rights of partners as to application of partnership property.
40. Apportionment of premium where partnership prematurely dissolved.
41. Rights where partnership dissolved for fraud or misrepresentation.
42. Right of outgoing partner in certain cases to share profits made after dissolution.
43. Retiring or deceased partner's share to be a debt.
44. Rule for distribution of assets on final settlement of accounts.

Supplemental.
45. Definitions of "Court" and "business."
46. Saving for rules of Equity and Common Law.
47. Provision as to bankruptcy in Scotland.
48. Repeal.
49. Commencement of Act.
50. Short title.
SCHEDULE.

An Act to declare and amend the Law of Partnership.

[14th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Nature of Partnership.

Definition of partnership.

1.—(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is—

(*a*) Registered as a company under the Companies Act 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint-stock companies; or 25 & 26 Vict., c. 89.

(*b*) Formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent, or Royal Charter; or

(*c*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries;

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership.

2.—In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b*) A contract for the remuneration of a servant

or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such :

(*c*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such :

(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3.—In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Meaning of firm.

4.—(1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Relations of Partners to persons dealing with them.

Power of partner to bind the firm.

5.—Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partners bound by acts on behalf of firm.

6.—An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.

7.—Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner.

8.—If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Liability of partners.

9.—Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of the firm for wrongs.

10.—Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in a firm or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm.

11.—In the following cases; namely—

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

Liability for wrongs joint and several.

12.—Every partner is liable jointly with his co-partners and also severally for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding sections.

Improper employment of trust property for partnership purposes.

13.—If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

Provided as follows:—

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Persons liable by "holding out."

14.—(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers

himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Admissions and representations of partners.

15.—An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to acting partner to be notice to the firm.

16.—Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Liabilities of incoming and outgoing partners.

17.—(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guaranty by change in firm.

18.—A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the

firm in respect of the transactions of which, the guaranty or obligation was given.

Relations of Partners to one another.

Variation by consent of terms of partnership.

19.—The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Partnership property.

20.—(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Property bought with partnership money.

21.—Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Conversion into personal estate of land held as partnership property.

22.—Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners

(including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Procedure against partnership property for a partner's separate judgment debt.

23.—(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

Rules as to interests and duties of partners subject to special agreement.

24.—The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules :—

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him

(*a*) In the ordinary and proper conduct of the business of the firm ; or,

(*b*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all existing partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Expulsion of partner.

25.—No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Retirement from partnership at will.

26.—(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partners giving it, shall be sufficient for this purpose.

Where partnership for term is

27.—(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without

any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will. continued over, continuance on old terms presumed.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

28.—Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. Duty of partners to render accounts, &c.

29.—(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection. Accountability of partners for private profits.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30.—If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm he must account for and pay over to the firm all profits made by him in that business. Duty of partner not to compete with firm.

31.—(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. Rights of assignee of share in partnership.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning

partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.

32.—Subject to any agreement between the partners, a partnership is dissolved—

(*a*) If entered into for a fixed term, by the expiration of that term;

(*b*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;

(*c*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death, or charge.

33.—(1) Subject to any agreement between the partners every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Dissolution by illegality of partnership.

34.—A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.

Dissolution by the Court.

35.—On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:—

(*a*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or

next friend or person having title to intervene as by any other partner :

(*b*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract :

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :

(*e*) When the business of the partnership can only be carried on at a loss :

(*f*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Rights of persons dealing with firm against apparent members of firm.

36.—(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Right of partners to notify dissolution.

37.—On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Continuing authority of partners for purposes of winding up.

38.—After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Rights of partners as to application of partnership property.

39.—On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

Apportionment of premium where partnership prematurely dissolved.

40.—Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Rights where partnership dissolved for fraud or misrepresentation.

41.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) To a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b*) To stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Right of outgoing partner in certain cases to share profits made after dissolution.

42.—(1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Retiring or deceased partner's share to be a debt.

43.—Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Rule for distribution of assets on final settlement of accounts.

44.—In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed :—

(*a*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits :

(*b*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital shall be applied in the following manner and order :

1.—In paying the debts and liabilities of the firm to persons who are not partners therein :

2.—In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital :

3.—In paying to each partner rateably what is due from the firm to him in respect of capital :

4.—The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Supplemental.

Definitions of "court" and "business."

45.—In this Act, unless the contrary intention appears,—

The expression "court" includes every court and judge having jurisdiction in the case :

The expression "business" includes every trade, occupation, or profession.

Saving for rules of Equity and Common Law.

46.—The rules of Equity and of Common Law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

Provision as to bankruptcy in Scotland.

47.—(1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean

sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of *cessio bonorum*.

(2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

Repeal.

48.—The Acts mentioned in the Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule.

Commencement of Act.

49.—This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

50.—This Act may be cited as the Partnership Act 1890.

SCHEDULE.—Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict., c. 60	The Mercantile Law Amendment (Scotland) Act 1856.	Section 7.
19 & 20 Vict., c. 97	The Mercantile Law Amendment Act 1856.	Section 4.
28 & 29 Vict., c. 86	An Act to amend the law of partnership.	The whole Act.

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